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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 504

APPALACHIAN COALS, INCORPORATED, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

FILED NOVEMBER 10, 1932

(37,201)

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VOL. I

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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Equity No. 1

UNITED STATES OF AMERICA, Petitioner,

v.

APPALACHIAN COALS, INCORPORATED, et al., Defendants

PETITION—Filed June 29, 1932

The United States of America, by Joseph C. Shaffer, United States Attorney for the Western District of Virginia, acting under the direction of the Attorney General, brings this proceeding in equity against:

I

The following corporations, each of which is duly organized and existing under the laws of the State of Delaware:

Appalachian Coals, Incorporated.
Blue Diamond Coal Company.
Clinchmore Coal Mining Company.
Columbus Mining Company.
[fol. 3] The Elkhorn Collieries Corporation.
Fork Mountain Coal Company.
Harlan-Wallins Coal Corporation.
Mahan Ellison Coal Corporation.
The P. V. & K. Coal Company.
Southern Collieries, Inc.
Southern Harlan Coal Company.
Stonega Coke & Coal Company.
Tennessee Consolidated Coal Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of Kentucky:

Ajax Coal Company.
Algoma Block Coal Company.

Bardo Coal Mining Company.
Berger Coal Mining Co., Inc.
Clear Fork Co., Inc.
Cornett Lewis Coal Company.
Cornett-Lewis Coal Company.
Creech Coal Co., Inc.
Crummies Creek Coal Co., Inc.
Dixie Darby Coal Company.
Elkhorn & Jellico Coal Company.
Elkhorn Junior Coal Company.
Gatliff Coal Company.
John P. Gorman Coal Company.
Harlan Fuel Company.
High Splint Coal Company.
Hignite Coal Company.
Mahan Jellico Coal Company.
Marlowe Coal Company.
Marietta Coal Company.
New Caryville Coal Company.
[fol. 4] North East Coal Company.
Paragon-Elkhorn Collieries Co., Inc.
Perkins Bowling Coal Corporation.
Perkins-Harlan Coal Company.
Sandlick Coal Company.
South East Coal Company.
Southern Mining Company.
Three Point Coal Company.
Turner Elkhorn Mining Company.
R. C. Tway Coal Company.
Wells Elkhorn Coal Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of Tennessee:

Bon Jellico Coal Company.
Cambria Coal Company.
Coalfield Coal Company.
Harvey Coal Corporation.
Moore Coal Company.
Pruden Coal and Coke Company.
Sagamore Coal Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of Virginia:

Allburn Coal Corporation.
Apex Coal Company, Inc.
Benedict Coal Corporation.
The Black Mountain Coal Corporation.
Blackwood Coal & Coke Company.
Boone County Coal Corporation.
Borderland Coal Corporation.
Clinchfield Coal Corporation.
Fort Branch Coal Corporation.
[fol. 5] Kemmerer Gem Coal Co., Inc.
Kentucky Cardinal Coal Corporation.
Meem-Haskins Coal Corporation.
Merrill Coal Mines, Inc.
New Garden Coal Corporation.
Norton Coal Company, Inc.
Red Jacket Consolidated Coal & Coke Co., Inc.
Splash Dam Coal Corporation.
Steinman Coal Corporation.
Tomlinson Coal Corporation.
Virginia Iron, Coal, and Coke Company.
The Wise Coal and Coke Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of West Virginia:

The Alma Fuel Company.
Amherst Coal Company.
Anchor Coal Company.
Cabin Creek Consolidated Coal Company.
The Carbon Fuel Company.
Clean Eagle Coal Company.
Clover Splint Coal Co., Inc.
Coalburgh Kanawha Mining Company.
Colcord Coal Company.
Crystal Block Coal & Coke Company.
Crystal Block Mining Company.
Detroit Mining Company.
Dry Branch Coal Company.
Earlston Coal Company.
Elkhorn Coal Corporation, Inc.
Ethel Block Coal Company.
The Gay Coal & Coke Company.
Glen Alum Coal Company.
[fol. 6] Glogora Coal Company.

Grey Eagle Mining Company.
Hutchinson Coal Company.
Kanawha & Hocking Coal & Coke Company.
Kelly Creek Collieries Company.
Koger Rangeley Coal Company.
Landstreet Downey Coal Company.
Leckie Collieries Company.
Leevale Collieries, Inc.
Little War Creek Coal Company.
Logan Chilton Coal Company.
Logan County Coal Corporation.
Long Flame Coal Company.
Majestic Collieries Company.
Mallory Coal Company.
Martin County Coal Corporation.
McCall Coal Company.
The Merrimac Coal Company.
Octavia J. Mining Company.
Panther Coal Company.
Pike Fuel Company.
Puritan Coal Corporation.
Red Jacket Jr. Coal Company.
Standard Thacker Coal Company.
Sudduth Fuel Company.
Sycamore Coal Company.
Thacker Coal and Coke Company.
War Eagle Coal Company.
Webb Coal Mining Company.
West Virginia Coal and Coke Corporation.
William Ann Coal Company.
Winco Block Coal Company.
Winifrede Block Coal Company.
Winifrede Collieries.
[fol. 7] Wood Coal Company.
Wyatt Coal Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of Arizona:

Atlas Coal Company.
Premier Coal Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of Maine:

Hardy Coal Company.
Island Creek Coal Company.

Against the following corporations, each of which is duly organized and existing under the laws of the State of Ohio:

The Kenmont Coal Company.
The Lorado Coal Mining Company.
Pike Floyd Coal Company.
The Youghiogheny and Ohio Coal Company.

Against Carbon Glow Mines, Inc., a corporation duly organized and existing under the laws of the State of Illinois.

Against Stearns Coal & Lumber Company, a corporation duly organized and existing under the laws of the State of Michigan.

Against Kenner McCoy, a citizen and resident of Williamson, West Virginia, and doing business under the name of Kenner McCoy Coal Company.

[fol. 8] Against the following individuals:

James D. Francis, President Appalachian Coals, Inc., and a citizen and resident of Huntington, W. Va.

E. C. Mahan, Vice-President of Appalachian Coals, Inc., and a citizen and resident of Knoxville, Tenn.

R. E. Howe, Secretary and Treasurer of Appalachian Coals, Inc., and a citizen and resident of Knoxville, Tenn.

II

Bituminous coal is produced in various parts of the United States, but approximately 90% of the total production is mined east of the Mississippi River. The relative position of the various fields east of the Mississippi River is shown by the following figures for 1929 production:

Producing Fields	Production (Net tons)
Appalachian Territory	95,100,000
Western Pennsylvania	91,700,000
Illinois	60,200,000
West Virginia Smokeless Field	57,500,000
Central Pennsylvania	45,200,000

Producing Fields	Production (Net tons)
Ohio and West Virginia Panhandle	30,500,000
Northern West Virginia	28,200,000
Indiana	18,500,000
Alabama	17,700,000
Western Kentucky	14,600,000
Somerset-Meyersdale, Cumberland-Piedmont	13,300,000
Miscellaneous	12,300,000

Upon the basis of similarity in quality of coal, competitive conditions, proximity to markets, transportation rates and other factors, each of the above named eleven fields is, generally speaking, a separate unit.

[fol. 9] III

Appalachian Coals, Incorporated, hereinafter called Appalachian Coals, Inc., was organized by operators of bituminous coal mines lying in that part of eastern Kentucky, eastern Tennessee, southwestern Virginia and southern West Virginia, known as the Appalachian region, to act as the exclusive selling agent for the great preponderance of coal therein produced. This region is known as the Southern High Volatile Field and will be hereinafter referred to as Appalachian territory. Coal produced therein will be hereinafter sometimes referred to as Appalachian coal. Appalachian territory comprises the counties of Bell, Floyd, Harlan, Johnson, Letcher, McCreary, Perry, Pike and Whitley in the State of Kentucky; the counties of Anderson, Campbell, Claiborne, Fentress, Grundy, Marion and Morgan in the State of Tennessee; the counties of Dickinson, Lee, Russell and Wise in the State of Virginia; the counties of Boone, Kanawha, Logan and Mingo in the State of West Virginia; and a small amount of producing territory outside the foregoing twenty-four counties, but adjacent thereto. Appalachian territory is composed of eight coal districts, known as Big Sandy-Elkhorn, Harlan, Hazard, Kanawha, Logan, southern Appalachian, southwest Virginia, and Williamson. The mines in said territory lie chiefly on the Chesapeake & Ohio, the Louisville & [fol. 10] Nashville, the Norfolk & Western, and Southern railroads, and their small subsidiary and connecting lines.

More than 75% of the coal produced therein is shipped into common markets on practically identical freight rates.

Each of the 136 corporate defendants other than Appalachian Coals, Inc., and Kenner McCoy, doing business under the name of Kenner McCoy Coal Company, which will sometimes hereinafter be referred to as the defendant produces, owns and operates one or more bituminous coal mines in Appalachian territory and has, as hereinafter more particularly described, entered into a contract making Appalachian Coals, Inc., its exclusive selling agent for all coal produced at its mine or mines in said territory. Each of said defendants is engaged in shipping all or a part of the coal produced at said mine or mines into a State or States other than the State of production. A substantial part of the coal produced by said defendants in Appalachian territory is shipped to Canada or other foreign countries. Heretofore said defendants have been independently engaged in the production, distribution and sale of bituminous coal in interstate commerce in competition with each other and with other producers of said coal.

IV

By the means and methods hereinafter set forth, and particularly by means of the uniform selling agency contracts between defendant producers and Appalachian [fol. 11] Coals, Inc., and under the circumstances and conditions hereinafter set forth, the defendants have engaged in, and are now engaging in, a combination and conspiracy in restraint of interstate and foreign commerce in bituminous coal, and by such means and methods and under such circumstances and conditions the defendants have combined and conspired, and are now combining and conspiring, to monopolize, and are attempting to monopolize, a part of the interstate commerce in bituminous coal, in violation of Sections 1 and 2 of the Act of July 2, 1890 (26 Stat. 209), known as the Sherman Anti-Trust Act.

V

On December 3, 1931, a large number of representative members of the National Coal Association having operations east of the Mississippi River, and including many of these defendants, met at New York City for the purpose of

devising ways and means for regulating the supply, distribution and price of bituminous coal in interstate commerce in the United States. Pursuant to this purpose they there approved the following plan and recommended its adoption by all producers of bituminous coal:

This plan provided that in each producing district of the United States a marketing company, called a selling agent, be set up. For this purpose the fields east of the Mississippi were grouped into eighteen districts, eight of which [fol. 12] were later united to form Appalachian territory, with the intent and result that not more than eleven common selling agents should control more than 70% of all of the bituminous coal produced east of the Mississippi River. In each district the operators were to be invited to subscribe to the stock of the selling agent representing the district and to enter into a uniform contract with it. A complete form of such uniform contract was agreed upon and approved. By the terms of the proposed contract the producer agreed to produce, sell and ship coal only upon the order and at the direction of the selling agent; the latter was given complete and exclusive control over the quantity of coal it would sell, over the terms, conditions and prices at which it would sell and over the customers to whom and the territories in which it would sell. The selling agent was required to apportion available orders among contracting producers, upon a quota basis to be agreed upon, in order to give each as nearly as possible its proportionate share of the business. Pursuant to said contract, plan and arrangement, each contracting producer would cease to control, and to determine independently, the quantity of coal which it would produce, the terms, conditions and prices at which it would sell, or the customers to whom or the territories in which it would sell. The contract was to become effective when a fixed per cent of the producers in the territory covered had agreed to sell exclusively [fol. 13] through the selling agent and was to continue in force for a period of ten years.

VI

Pursuant to said plan, during December, 1931, representatives of producers in Appalachian territory prepared a charter for Appalachian Coals, Inc., a form of stock sub-

scription agreement, a form of contract to be entered into between it and coal producers, and a form of contract to be used by it when employing subagents. At a general meeting of producers in Appalachian territory held in Cincinnati, Ohio, on December 30, 1931, the charter, as amended, and the proposed form of stock subscription and forms of contracts were approved. The meeting unanimously voted to recommend that producers sign the proposed contract with Appalachian Coals, Inc., and subscribe to its stock, and that the contracts and stock subscriptions be deposited in escrow pending a further meeting on January 27, 1932.

It is essential to the successful operation of said general plan that each selling agency should control a large preponderance of the coal mined in the region represented by it. Because of this fact, defendants at a meeting held on January 27, 1932, agreed that their plan should not become binding and effective until operators producing at least 70% of the coal mined in Appalachian territory should sign said contract with Appalachian Coals, Inc.

[fol. 14] At a general meeting of producers in Appalachian territory held in Cincinnati, Ohio, on March 1, 1932, the secretary of the meeting reported that producers representing approximately 73% of the 1931 commercial tonnage in that territory had signed contracts with Appalachian Coals, Inc. The meeting decided that a sufficient percentage of the tonnage had signed contracts or had definitely indicated an intention to do so to justify proceeding with the common selling agency plan approved at the meeting of December 30, 1931. It was agreed that the various selling agency contracts and stock subscription agreements should be forthwith delivered and become effective. The subscribers present, proceeding to act as if they were in a stockholders' meeting, selected 25 individuals who were recommended for election as directors of Appalachian Coals, Inc. In accordance with the corporation's by-laws, the subscribers in each of the 8 producing districts in Appalachian territory nominated 2 directors to serve as so-called regional directors, and 9 others were selected to serve as directors at large. Either before or immediately following said meeting of March 1, 1932, all of said 25 individuals were elected directors of Appalachian Coals, Inc., and are now serving as such directors.

VII

Appalachian Coals, Inc., has an authorized capital consisting of 1,000 shares of common stock of a par value of [fol. 15] $1 each and 9,000 shares of 7% cumulative preferred stock of a par value of $100 each. The common stock has exclusive voting power.

There are now issued and outstanding 439 shares of the common stock of Appalachian Coals, Inc., all of which was issued at par to the 137 defendant producers. Said stock was subscribed for and issued upon the basis of one share for each 100,000 tons or major fraction thereof of the producer's 1931 production (but in no case less than one share). The defendant producers have also subscribed at par for 5,206 shares of said corporation's preferred stock, upon the basis of one share for each 666⅔ tons or major fraction thereof of the subscriber's average monthly production during 1931. Said stock subscriptions have been accepted by Appalachian Coals, Inc., but the purchase price has not yet been paid and said preferred stock has not yet been issued. The par value of the common and preferred stock thus issued or subscribed is $520,499. Four of the 137 defendant producers own together more than one-fourth of the outstanding common stock of Appalachian Coals, Inc., and 17 of the defendant producers own a majority of said stock. The largest common stockholder is the defendant Island Creek Coal Company, which owns 43 shares of said common stock and the vice-president of which is president of Appalachian Coals, Inc. The remaining and unissued common stock of Appalachian Coals, Inc., is being held for, and will be issued only to, other coal producers in [fol. 16] Appalachian territory who may later sign a like selling agency contract with said corporation.

Each defendant producer in subscribing to stock of Appalachian Coals, Inc., gave the latter the option to repurchase its common stock upon the happening of any one of the following contingencies: (a) if the corporation should cease to be the exclusive selling agent for all coal produced by the stockholder in Appalachian territory, or (b) if the stockholder should cease to produce coal or (c) should violate any present or future contract with the corporation, or (d) if title to the stock should pass to another.

VIII

Pursuant to said plan, each defendant producer has entered into a uniform contract with Appalachian Coals, Inc. By the terms of this contract the producer appoints Appalachian Coals, Inc., herein called the Selling Agent, as its exclusive agent for the sale of all coal (except deliveries upon outstanding contracts and coal used in the operation of its mines or sold to employees) produced at its mine or mines in Appalachian territory, and agrees not to dispose of, sell, or ship any of said coal except upon the order or at the direction of the Selling Agent. The producer authorizes the Selling Agent to sell its coal at the best prices obtainable and agrees promptly to fill all orders taken by the Selling Agent at the prices determined by the latter. On sales for future deliveries exceeding 60 days the Selling Agent is required to obtain prior authorization from the [fol. 17] producer. The Selling Agent is obligated to grade all coal of the producers whom it serves and to apportion total sales among them in such a way as to give each producer's mine or mines producing the same or interchangeable grades of coal as nearly as possible its pro rata part of available orders. The producer agrees to pay the Selling Agent a commission of 10% of the gross selling price f. o. b. at the mines. The Selling Agent agrees that it will collect the purchase price, guarantee accounts, and remit to the producer the purchase price of its coal, less commissions and deductions authorized by the contract. Any controversy growing out of the contract is to be arbitrated.

The contract further provides that it shall become effective when executed by both parties; that the producer's coal shall be turned over to the Selling Agent for sale not later than July 1, 1932, or within thirty days after the favorable termination of any litigation that may be instituted prior thereto for the purpose of enjoining the Selling Agent's operations thereunder and that the producer may cancel the contract on or before February 1, 1933, by giving thirty days' written notice. None of defendant producers has given such notice.

At the present time many hundreds of persons and corporations are engaged as agents, subagents, jobbers, brokers and dealers in selling and dealing in the coal produced by the defendant producers.

[fol. 18] The said contract authorizes the producer to designate at any time a subagent on the terms and conditions in the form of subagent's contract annexed thereto; it being intended that each defendant producer shall have not more than one subagent, or in a few cases not more than two subagents, one for eastern deliveries and one for western deliveries. This subagency contract authorizes the subagent to sell coal only in such amounts as the Selling Agent may designate and only upon such terms and conditions and at the price or prices established by the Selling Agent from time to time. The Selling Agent agrees to pay the subagent a commission of 8% of the selling price f. o. b. at the mines. All coal sold by the subagent under the agreement is to be invoiced in the name of the subagent as agent for the Selling Agent, and payment therefor is to be made to the subagent and remitted by it to the Selling Agent, less authorized commissions and deductions. The subagent is required by said contract to guarantee the payment of all accounts for coal sold by it thereunder.

Each defendant producer has indicated that it will appoint a subagent for the sale of the coal which it has agreed to sell exclusively through the Selling Agent.

The selling agency contracts between defendant producers and the Selling Agent will not, and are not intended to, reduce selling costs. At the time these contracts were [fol. 19] entered into, the usual commission for the sale of Appalachian coal was 8% of the selling price f. o. b. at the mines. Under the uniform subagency contracts subagents will receive the same commission, but the producers must pay the Selling Agent an additional 2%, out of which will be paid the cost of maintaining this new, supervisory selling organization.

IX

The chairman of the meeting of December 3, 1931, which, as previously set forth, approved the sales agency plan, appointed a committee in each producing district to procure, if possible, adoption of the plan by the operator therein. Pursuant to this action, in a number of districts east of the Mississippi River said plan has been adopted and organization therein of a common sales agency has been undertaken. In some districts such organization was

well advanced before it was decided in each case to hold the plan in abeyance because of the announcement by the Department of Justice in January, 1932, that it regarded the plan as probably illegal. Prior thereto organization of common selling agencies had been undertaken as follows:

The committee representing operators in the Smokeless Field of West Virginia (known as the Pocahontas, Tug River, New River and Winding Gulf districts) procured a charter for a selling agency under the name of Smokeless Coal Corporation. At a meeting attended by producers of [fol. 20] by far the larger part of the coal produced in that region, the plan was recommended for adoption and the proposed forms of contract were considered in detail. The committee printed and distributed a pamphlet containing the charter of Smokeless Coal Corporation, its by-laws, forms of a contract between it and producers, of a contract between it and subagents, and of a stock subscription agreement. Early in February, 1932, the committee advised operators that no further action would be taken until the legality of said plan had been determined by the courts, but that it appeared that an organization could be perfected with sufficient tonnage to make it a complete success.

The committee representing operators in the State of Ohio procured a charter for a selling agency under the name of Northern Coals, Inc., and obtained a license for it to do business in the State of Ohio. The committee printed and distributed a pamphlet containing the charter of this corporation, its by-laws, forms of a contract between it and producers, of a contract between it and subagents, and of a stock subscription agreement. The pamphlet stated that it was hoped that all producers having mines in Ohio and in the West Virginia Panhandle would be brought into the agency. The plan was last considered at a meeting of operators early in March, 1932.

At a meeting of a majority of the producers in western Kentucky in January, 1932, the common selling agency plan [fol. 21] was approved in principle by all except one of the producers present. The meeting considered forms of a contract between producers and the proposed selling agent and of a contract between it and subagents, which the committee had prepared, and certain changes were suggested. At a further meeting of producers early in February, 1932,

the committee was instructed to prepare by-laws for the selling agency and a plan of organization.

A general meeting attended by producers representing a majority of the tonnage in northern West Virginia was held in January, 1932. The meeting approved in principle the common selling agency plan and appointed a committee to draw up a definite plan of organization for the northern West Virginia district. The committee prepared and sent to various producers in that district (1) a general statement regarding the plan, (2) form of charter of selling agent, (3) form of by-laws, (4) form of stock subscription agreement, (5) form of contract between producers and selling agent, (6) form of contract between selling agent and sub-agents and (7) form of suggested minutes authorizing execution by producers of contract with selling agent and of subscription to its stock.

The committee representing operators in Western Pennsylvania appointed a subcommittee, which devoted a large amount of time to working out a common selling agency plan and sent a questionnaire to about 75 producers in that district.

[fol. 22] A group of operators in Alabama conferred concerning the organization of a common selling agency for producers in that State and designated counsel to prepare an outline along the lines of the plan of organization of Appalachian Coals, Inc.

If the aforesaid conspiracy, plans and contracts of the defendants are not restrained and prohibited by the court in this proceeding, a similar common selling agency plan (representing at least 70% of the tonnage therein) will be organized forthwith and put into effect in each of the principal districts producing coal which is actually or potentially competitive with coal represented by Appalachian Coals, Inc. The selling agency contracts between defendant producers and Appalachian Coals, Inc., were entered into with the intent upon the part of the defendants herein, and upon the understanding amongst them and the operators in other fields represented at the aforesaid meetings, that, within a short time after this selling agency plan shall have come into operation, or been declared legal by the courts, a similar common and exclusive selling agency plan would be created and established in each of the other principal

producing fields, for the purpose of controlling and regulating the supply, distribution, and prices of at least 70 per cent of the bituminous coal produced in each of said fields and sold, transported, and shipped in interstate trade and commerce as aforesaid.

[fol. 23] X

Total bituminous coal production in the United States in 1913 and since 1918 has been as follows:

Year.	Production (net tons.)
1913	478,435,000
1919	465,860,000
1920	568,667,000
1921	415,922,000
1922	422,268,000
1923	564,565,000
1924	483,687,000
1925	520,053,000
1926	573,367,000
1927	517,763,000
1928	500,745,000
1929	534,989,000
1930	467,526,000
1931	378,110,000

Average production during the past five years represents an increase over 1913 production of less than ⅓ of 1%. Average production since 1918 represents an increase of about 3% over 1913 production. Occasional periods of shortage and high prices, as well as further mechanization of mines, have led to an expansion since 1913 in the productive capacity of the bituminous coal industry. Increased capacity and stationary or declining demand have brought the price of bituminous coal well below the average price for the years 1916 to 1923, inclusive. Nevertheless, the average spot price of bituminous coal in December, 1931, was about 20% above the average spot price in 1913, whereas commodity prices as a whole were then lower than in 1913.

The value of bituminous coal is low in comparison with [fol. 24] the cost of transportation. Certain fields are therefore able to dominate certain consuming markets; but there

is a wide difference between fields in the average cost of production, which enables those with lower production costs to dominate certain markets to which they have no, or even an adverse, freight differential. The average cost of production in Appalachian territory, due primarily to lower labor costs, is substantially lower than in the older fields in Indiana, Illinois, Ohio and Pennsylvania. In addition, Appalachian coal is superior in quality to the coal produced in Indiana, Illinois and Ohio. The pig iron and glass industries can and do use Appalachian coal, but these industries can not use Indiana, Illinois or Ohio coal because of its sulphur content. Because of lower costs of production, better quality of coal and other factors, total production for the States in which Appalachian territory lies (Kentucky, Tennessee, Virginia and West Virginia) was 99% higher in 1929 than in 1913, while total production in Indiana, Illinois and Ohio was 30% lower in 1929 than in 1913.

The principal destinations or markets for Appalachian coal are, in order of importance, Ohio, Railroad fuel sales, Lake Port deliveries, Michigan, Indiana, Tidewater deliveries, Illinois, North Carolina, Kentucky, South Carolina, Georgia, Tennessee, Virginia, West Virginia, Iowa, Wisconsin, Production of coke at mines, Sales to local trade, Canada, Minnesota, and Florida. Shipments to Lake Ports are [fol. 25] distributed approximately 25% to Wisconsin, 24% to Minnesota, 20% to Michigan, 18% to the Chicago district, 8% to New York and 5% miscellaneous. Substantially all of the tidewater shipments go to New England. Less than 100,000 tons of Appalachian coal are shipped annually to Alabama, Pennsylvania and South Dakota and a negligible quantity directly to Connecticut, District of Columbia, Louisiana, Kansas, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New York, New Jersey and North Dakota.

The total consumption of bituminous coal in 1929, 1930 and 1931 in the following cities of western and central Ohio and the per cent thereof represented by Appalachian coal were approximately:

City	Total consumption	Per cent Appalachian coal
Miami Valley (35 cities and towns)	4,770,000	91
Springfield	738,000	90
Dayton	2,530,000	76
Marion	461,000	70
Cincinnati	5,242,000	67
Lima	823,000	61
Columbus	3,390,000	57
Toledo	5,256,000	55
Delaware, Findlay	548,000	55
Total	23,758,000	..
Annual average	7,919,333	..

The total consumption of bituminous coal in 1929, 1930 and 1931 in the following cities in the lower Michigan peninsula and the per cent thereof represented by Appalachian [fol. 26] coal were approximately:

City	Total consumption	Per cent Appalachian coal
Kalamazoo	1,857,000	90
Battle Creek	989,000	87
Lansing	1,349,000	81
Flint	1,702,000	78
Jackson	750,000	76
Grand Rapids	2,413,000	67
Detroit	29,042,000	52
Miscellaneous	10,820,000	77
Total	55,022,000	..
Annual average	18,340,666	..

Of the total bituminous coal consumed (other than railroad fuel) in the following States, the per cent represented by Appalachian coal is:

South Carolina	Over 80%
North Carolina	About 70%
Georgia	About 70%
Kentucky	About 50%
Tennessee	Over 33%
Virginia	Over 33%
West Virginia	Over 33%

In North Carolina, South Carolina and Virginia substantially all the remaining bituminous coal consumed therein comes from the West Virginia Smokeless Field. In Kentucky and Tennessee substantially all the remaining bituminous coal consumed therein comes from western Kentucky and in Georgia substantially all the remaining coal consumed therein comes from Alabama.

The production in the West Virginia Smokeless Field is quite generally competitive with Appalachian coal. In all the other important producing fields the bituminous coal output is competitive in substantial quantities with Appalachian coal only in a few marketing areas. The production [fol. 27] west of the Mississippi River is wholly non-competitive except in the Iowa market, to which about 1.5% of Appalachian coal is shipped. In the important producing fields east of the Mississippi River, other than the West Virginia Smokeless Field, the production competes with Appalachian coal in substantial quantities only as shown below:

Producing field	Competitive market
Central and western Pennsylvania	Ohio and Lake port and tidewater shipments.
Indiana and Illinois	Indiana, Illinois, Iowa, and Wisconsin.
Northern West Virginia	Lake port and tidewater shipments.
Ohio	Ohio and Lake port shipments.
Alabama	Georgia.
Western Kentucky	Indiana, Illinois, Iowa, Kentucky, and Tennessee.

XI

The following tabulation shows for the 1930-1931 fuel year of the railroads named the number of tons of fuel coal (a) obtained from their own mines and (b) purchased, and the per cent of total purchases represented (a) by coal of defendant producers and (b) by Appalachian coal:

Railroad	Own production	Purchases		
		Tonnage	Defendant producers	Appalachian coal
			Per cent	Per cent
Southern	445,077	2,671,449	69	83
Chesapeake & Ohio	523,595	2,180,264	67	83
Atlantic Coast Line	0	1,236,110	44	68
Norfolk & Western	1,125,809	1,302,951	39	63
Louisville & Nashville	0	3,162,041	31	47
Seaboard Air Line	0	1,657,380	30	38
Carolina, Clinchfield & Ohio	0	165,249	100	100
Richmond, Fredericksburg & Potomac	0	210,992	75	100
Norfolk & Southern	0	127,605	67	92

[fol. 28] The foregoing figures are representative of the existing situation with respect to the fuel coal purchases by the above railroads. The purchases of Appalachian coal by the Baltimore & Ohio, the New York Central and the Pennsylvania railroads do not constitute a large per cent of their total fuel coal purchases.

XII

The total production of coal in Appalachian territory (omitting closed mines) for the last three years, divided between captive mines (substantially all the output of which is consumed by a parent or affiliated corporation) and noncaptive or commercial mines, is as follows:

Year	Captive mines	Noncaptive mines	Total
1929	16,455,000	78,067,000	94,522,000
1930	14,833,000	71,295,000	86,128,000
1931	12,175,000	60,061,000	72,236,000

The total production during the last three years of noncaptive or commercial mines in Appalachian territory, divided between defendant producers and other producers, is as follows:

Year	Defendant producers	Other producers	Total
1929	58,097,000	19,970,000	78,067,000
1930	51,663,000	19,632,000	71,295,000
1931	42,437,000	17,624,000	60,061,000

[fol. 29] For the three years combined the output of defendant producers was 72.67% of the total production of noncaptive mines in Appalachian territory. Numerous producers in Appalachian territory who have not yet contracted to sell their coal exclusively through Appalachian Coals, Inc., will enter into such a contract if the legality thereof is sustained in this proceeding. Appalachian Coals, Inc., will soon thereafter, and continuously until March 1, 1935, control not less than 75% and probably at least 80%, of the total production of noncaptive mines in Appalachian territory. The output of producers in Appalachian territory who have not yet agreed to sell their coal through Appalachian Coals, Inc., is, in general, comparatively small. Twenty-three defendant producers each had during the last three years an average annual production of over 500,000 tons, ten of them had an annual average of over 1,000,000 tons and one of over 5,300,000 tons. Of the producers in Appalachian territory who have not signed the common selling agency contract, none (excepting one company which is in receivership) had during the same period an average annual production of 1,000,000 tons and only 3 an average annual production exceeding 500,000 tons.

XIII

The principal purpose of defendant producers in contracting to sell exclusively through Appalachian Coals, Inc., is to obtain a higher average price for their output [fol. 30] than would be possible under conditions of free competition. In order to effectuate this purpose, they have agreed to eliminate all competition among themselves in the sale of coal and have agreed, in substance, to limit production to the quantities fixed and determined by their common selling agent. Said defendants also anticipate and intend that their combination to increase the average price received for their output will be made completely effective by the adoption of the common selling agency plan in other producing regions. The effect of such adoption will be to increase the average price at which coal produced outside of Appalachian territory is offered for sale and sold in competition with the coal of defendant producers. The effect of such adoption will also be to bring production in other areas under control and to decrease the supply of coal which is offered for sale and sold in competition with the coal of defendant producers.

Defendant producers have adopted the common selling agency plan as a device and instrumentality to enable them to put an end to all competition among themselves in the sale of their coal in interstate and foreign commerce, to control the supply, distribution and price of Appalachian coal sold or offered for sale in such commerce, and to enable them to deal as a single unit with all purchasers and potential purchasers of their coal, thereby directly restraining interstate and foreign commerce in the coal produced by the defendant producers.

[fol. 31] Defendant producers, through the instrumentality of their uniform sales agency contracts with Appalachian Coals, Inc., have mutually agreed that each will designate only one subagent (or in a few cases only two subagents) for the sale of its coal and that every subagent desiring to sell the coal of defendant producers will be required to accept the same terms and conditions in its subagency contract, including a uniform selling commission and an agreement to guarantee all accounts for coal sold thereunder. The necessary effect of the agreement of defendant producers is, by concert of action, to exclude from

the business of selling in interstate commerce coal of the defendant producers, every coal agent, jobber, dealer or broker who is not designated as a subagent or who can not carry on such business upon the stipulated terms and conditions.

XIV

Wherefore petitioner prays:

1. That writ of subpœna issue, directed to each defendant, commanding him or it to appear herein and answer under oath the allegations contained in this petition, and to abide by and perform such orders and decrees as the court may make in the premises.

2. That the court decree and adjudge that the defendants have engaged, and are now engaging, in a combination and conspiracy in restraint of interstate and foreign commerce [fol. 32] in bituminous coal, and have combined and conspired, and are now combining and conspiring, to monopolize, and are attempting to monopolize, a part of the interstate commerce in bituminous coal in the manner and by the means described in the petition, in violation of the aforesaid Act of Congress of July 2, 1890.

3. That the court permanently enjoin the defendants from further engaging in, carrying out, or maintaining said combination and conspiracy, or any other of like character and effect.

4. That the court decree that each exclusive selling agency contract between each and every defendant producer and Appalachian Coals, Inc., is null and void, and is cancelled.

5. That the petitioner recover its costs.

6. That the petitioner have such other, further and general relief as the nature of the case may require and the court may deem proper in the premises.

Joseph C. Shaffer, United States Attorney. William D. Mitchell, Attorney General. John Lord O'Brian, the Assistant to the Attorney General. Russell Hardy, Charles H. Weston, Special Assistants to the Attorney General.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS—Filed July 19, 1932

The defendants, jointly and severally, by their solicitors, answering the petition of the United States of America, respectfully say:

I

The defendants admit that each of the several corporate defendants listed in paragraph "1" of the petition is duly organized and existing under the laws of the several states, as alleged therein. They further say that during the past year immediately preceding the filing of the petition herein, receivers in equity or trustees in bankruptcy have been appointed for the corporate defendants hereinafter named, and their respective businesses and assets are now being [fol. 34] administered by the receivers or trustees in bankruptcy, as the case may be, as hereinafter indicated.

Name of Corporation	Name of Receiver or Trustee in Bankruptcy
Elkhorn Coal Corporation, Inc.	C. W. Watson, Receiver, appointed by Circuit Court, Letcher County, Kentucky.
John P. Gorman Coal Co.	John P. Gorman, Receiver.
Norton Coal Company	W. J. Willits and W. C. McCall, Receivers, Circuit Court of Wise County, Va.

The heavy financial losses which the producers of bituminous coal have sustained during the years immediately preceding the filing of the petition and which brought about the receiverships and bankruptcies of the foregoing defendants have been caused by heavy shrinkage in volume of business, increased competition from substitutes for bituminous coal, such as oil and gas, loss of earnings and wasteful and unfair competitive practices, sales below cost of production and other uneconomic and ruinous practices.

In the event that prior to a determination of this cause, additional receivers or trustees in bankruptcy are ap-

pointed for other corporate defendants as is expected, the solicitors for the defendants will promptly advise this Honorable Court and the solicitors for the petitioner thereof in order that, if desired, such receivers or trustees may be made parties-defendant to this suit.

[fol. 35]

II

The defendants admit that bituminous coal is produced in various parts of the United States and that approximately 90% of the total production is mined east of the Mississippi River. Defendants admit that there are certain producing fields east of the Mississippi River, as shown in the table alleged in paragraph "II" of the petition, and that in the year 1929, the production in each of those fields was approximately as stated therein. In addition, defendants aver that the production, in net tons, of each of these producing fields declined substantially in the years 1930 and 1931, as shown by the following table:

Producing field	Production (Net tons) 1929	1930	1931
Appalachian Territory	97,855,252	94,694,491	78,407,150
Pennsylvania:			
Western Pennsylvania	93,280,602	79,104,000	97,276,000*
Central Pennsylvania	42,667,369	38,360,000	
Somerset-Meyersdale, Cumberland-Piedmont	11,641,381	10,771,000	1,950,000**
Ohio and West Virginia Panhandle	30,828,983	28,326,866	25,819,917
West Virginia Smokeless	56,373,843	50,243,000	42,551,306
Northern West Virginia	30,762,527	26,251,000	21,618,047***
Indiana	18,344,358	16,489,962	13,310,000
Illinois	60,657,641	53,731,230	44,105,000
Alabama and Georgia	17,988,559	15,577,150	11,620,000****
Western Kentucky	14,437,148	10,915,301	8,345,000
Total	474,837,663	424,464,000	345,002,420

* Pennsylvania figures for 1931 not available by districts; this total includes production of Somerset-Meyersdale District.

** Cumberland-Piedmont only, Somerset-Meyersdale included with Pennsylvania.

*** Includes 956,288 tons in Tucker, Mineral and Grant Counties included in other years in Cumberland-Piedmont District.

**** Alabama only, Georgia not available.

Authority: Reports of U. S. Bureau of Mines.

[fol. 36] Defendants deny that upon the basis of similarity in quality of coal, competitive conditions, proximity to markets, transportation rates and other factors, each of the above-named eleven fields is, generally speaking, a separate unit; and the defendants aver, on the contrary, that, gener-

ally speaking, the producers engaged in producing bituminous coal in the Appalachian territory and in other producing territories east of the Mississippi River actively compete with each other in all of the markets in which high-volatile bituminous coal is offered for sale, and that coal produced in these several districts may be used and consumed interchangeably for all purposes.

Defendants aver that the producers in each of these fields, including the defendants and other producers in the Appalachian territory who have not and who do not intend to enter into contracts with the defendant, Appalachian Coals, Inc., are all engaged in competition with each other in selling coals in the markets to which coal may be and is shipped by these producers. Except as expressly admitted herein, the defendants deny each and all of the allegations of paragraph "II" of the petition.

III

Answering the allegations of paragraph "III" of the petition, the defendants admit that defendant Appalachian Coals, Incorporated, was organized on or about January 6, 1932, by certain operators of high-volatile bituminous coal mines lying in that part of eastern Kentucky, eastern Tennessee, southwestern Virginia and southern West Virginia, [fol. 37] known as the southern high-volatile field and referred to in the petition herein as the Appalachian region, to act as the exclusive selling agent for the persons, firms and corporations who have subscribed to its capital stock and entered into contracts with it, appointing it the exclusive agent for the sale of such coal as they may produce, but subject to the right, as hereinafter more fully alleged, of each such producer to nominate one or more persons, firms or corporations to be appointed as sub-agents of Appalachian Coals, Inc., for the purpose of selling the coal of such producers.

Further answering paragraph "III" of the petition, the defendants have appended as a part of the separate defense hereinafter alleged an Exhibit A which contains therein a true and correct copy of the form of agreement between individual producers and Appalachian Coals, Inc., and of the form of agreement between Appalachian Coals, Inc. and its sub-agents, both of which are made part of this answer as though herein set forth at length.

The defendants admit that it is expected that when and if it shall commence operations, Appalachian Coals, Inc. shall act as the selling agent for operators who, according to estimates for the year 1931, produce and market approximately 70% of the total high-volatile bituminous coal produced in the Appalachian territory; and the defendants admit that if and when Appalachian Coals, Inc. shall commence operations, it will market a large part of the total high-volatile bituminous coal shipped from such field; but the defendants aver that each of the operators engaged in the production of high-volatile bituminous coal in such field who [fol. 38] has not and who does not intend to enter into contracts with Appalachian Coals, Inc., under which it shall act as selling agent, who has not subscribed to its capital stock, and who produces and markets the remaining high-volatile bituminous coal produced in such field, will continue to sell large quantities of such coal in active, direct competition with the coal to be sold by Appalachian Coals, Inc., and its several sub-agents, when and if it shall commence operations.

Defendants admit that the Appalachian territory as defined in paragraph "III" of the petition, comprises the counties, is composed of the eight coal districts and is served by the respective railroads,—all as alleged in paragraph "III" of the petition.

The defendants admit, as averred in Paragraph "III" of the petition, that approximately 75% of the coal produced in the Appalachian territory is shipped into common markets on practically identical freight rates; and the defendants say that the freight rates from all parts of the Appalachian territory to the several particular destination groups in the marketing territory into which approximately 75% of such coal is shipped are, generally speaking, substantially the same except that the freight rates from that portion of the territory in the State of Virginia are from fifteen to twenty-five cents per ton higher to most of the destinations in the marketing territory North and West of the Ohio River.

Defendants admit that each of the 136 corporate defendants, other than Appalachian Coals, Inc., and Kenner McCoy, doing business under the name of "Kenner McCoy Coal Company," collectively referred to in the petition and [fol. 39] in this answer as the "defendant producers," owns and operates one or more bituminous coal mines in the

Appalachian territory; that each of the defendant producers has entered into a contract with Appalachian Coals, Inc. (included in "Exhibit A" hereto), making it the exclusive selling agent for the sale of coal produced at their respective territory. Defendants beg leave to refer to a copy of the form of such contract (included in "Exhibit A" hereto), for a full complete statement of all of the terms and conditions thereof.

Each of the defendant producers admits that it has been, and now is, engaged in shipping all or a part of the coal produced by it into a state or states other than that in which it was, or is, produced; and admits that a part of the coal produced by the said defendants has been, and is now, being shipped to Canada or other foreign countries.

The defendant producers admit that, except as hereinafter stated, they have been independently engaged in the production, distribution and sale of high-volatile bituminous coal in interstate commerce in competition with each other and with other producers of bituminous coal; and the defendant producers aver that at the present time they are and will continue to be so engaged in competition with each other and with other producers of bituminous coal as well as other competitive fuels.

Further answering, the defendant producers say that for many years prior to the filing of this petition a substantial part of the bituminous coal produced by many of them, as well as by producers other than the defendants herein, en- [fol. 40] gaged in producing bituminous coal in the Appalachian territory and in other fields, has been and is now being marketed and sold by a common selling company or companies or selling agency or agencies, and that such arrangements for the marketing and sale of bituminous coal through a common selling agency have been the established customary means for the marketing and sale of large quantities of bituminous coal, especially where such coal has been produced by those producers who, by reason of insufficient volume of sales, insufficient working capital, excessive cost of selling, lack of trained salesmen and selling facilities, have been and are unable to maintain their own sales departments or selling agencies and have, therefore, developed the established practice in the bituminous coal industry of making agreements with other producers or established selling agencies whereby the coal of all such producers so situated

should be and is marketed and sold through such a common selling agency.

In addition, the defendants say that no producer or selling agency at present engaged in selling high-volatile bituminous coal produced in the Appalachian territory has sufficient volume of sales to justify the expense of maintaining a selling organization able to compete actively in all markets where such coal is now offered for sale.

The defendants further aver that in developing the plans for the formation of Appalachian Coals, Inc., and in entering into the contracts constituting it as the exclusive selling agent of the defendant producers, these defendants have, in effect, made use of, perfected and extended an es- [fol. 41] tablished practice and custom in the marketing and selling of bituminous coal which has become and now is required in order to prevent uneconomical and wasteful marketing of large quantities of coal, to secure purchasers for such coal, and thus to preserve and promote the security, service and stability of the industry.

IV

Defendants deny each and all of the allegations contained in paragraph "IV" of the petition; and they particularly deny that the entering into or the performance of the uniform selling agency contracts between the defendant producers and Appalachian Coals, Inc., has, or will, constitute any combination or conspiracy in restraint of interstate and foreign commerce in bituminous coal or to monopolize or an attempt to monopolize any part of such commerce in violation of Sections 1 and 2 of Sherman Act (26 Stat. 209).

The defendants aver that each and all of the acts done, or proposed to be done, and proceedings taken, or proposed to be taken, by the defendants have been designed to promote, and, if put into operation, will have the effect of promoting, rather than restraining, interstate trade and commerce in high-volatile bituminous coal, by providing for the orderly and economic production and marketing of such coal; and the defendants further aver that such acts and proceedings, if carried out, are intended and will have the effect of preventing a monopoly or an attempt of monopolization of such trade in commerce by securing

to the operators of high-volatile bituminous coal mines, now in failing circumstances, the opportunity to continue [fol. 42] in the production and marketing of their coal, to continue to employ labor and maintain and increase wages above the present abnormally low levels and thus prevent the shutting down of mines and help to prevent further receiverships, bankruptcies and forced sales of mining properties at sacrifice prices, which in recent years have been so frequent in this industry.

V

The defendants deny that on December 3, 1931, any members of the National Coal Association, having operations east of the Mississippi River, or that any of the defendants, met at New York City for the purpose of devising ways and means of regulating the supply, distribution and price of bituminous coal in interstate commerce in the United States.

The defendants deny that at such meeting they approved any plan, the purpose of which was to regulate the supply, distribution and price of bituminous coal in interstate commerce in the United States; and they deny that any plan was recommended at such meeting for adoption by all producers of bituminous coal.

The defendants further deny that any plan was considered, approved, or adopted, at such meeting or elsewhere, providing that in each coal-producing district of the United States a marketing company, called a selling agent, be set up, or that any actions pursuant to such plan were considered or taken.

The defendants deny that the plan approved at said meeting provided that the selling agent should have, or that the form of contract referred to in the bill gave to [fol. 43] the selling agent, "Complete and exclusive control over the quantity of coal it would sell," as alleged in the petition, if it is meant thereby that the selling agent would or could control the amount of coal produced. Defendants aver, on the contrary, that it was contemplated by said plan and provided by said contract that the selling agent should sell all the coal it could in all the competitive markets, "at the best possible prices obtainable," and to such customers as it might obtain. The duties and obliga-

tions of the Regional Sales Agent would differ in no respect from the duties and obligations of other selling agents then and now engaged in selling coal.

Defendants admit that a meeting of producers of bituminous coal was held on December 3, 1931, in the City of New York, for the purpose of considering whether any means could be found to provide relief from the chaotic and distressing conditions which then were and still are prevalent in the bituminous coal industry; that this meeting was one of a series of meetings held prior thereto at New York and elsewhere for the same purpose; that at these meetings a considerable number of separate and different types of plans for the relief of the bituminous coal industry were submitted and discussed; that at a meeting prior to the meeting held December 3, 1931, a committee was appointed to study and report upon the several plans previously submitted and discussed; that at the meeting held on December 3, 1931, in the City of New York, the committee submitted a report in which it was proposed that in view of the fact that consolidation of the physical assets and businesses or mergers of corporations appeared [fol. 44] at this time to be practically impossible, because of the inability to raise cash by the sale of new securities to carry out such consolidations or mergers and because of the difficulty in applying a uniform measure of valuation in connection therewith and because of the desire of individual producers to continue to control their own business until consolidations or mergers could be worked out, as an initial step the Committee favored a plan which, if it could be adapted to meet the conditions in various producing districts, might provide some relief from the chaotic and distressing conditions in the production and marketing of bituminous coal. This suggested plan contemplated organizing one or more additional regional sales agencies which would engage in distributing and selling the coal production in one or more of the several districts more advantageously and more economically than it was then and now is being distributed and sold. Defendants further aver that the Committee presented their report to the meeting held on December 3, 1931, in writing, a true and correct copy of which report is hereto attached and made a part hereof.

Defendants aver that the motives which prompted the said committee to favor the organization of regional or district sales agencies included, among others, the following: The practice of making agreements for the use of common selling agencies for many years prior thereto had been an established custom among many producers of bituminous coal, as hereinabove more fully stated; the organization of additional common selling agencies in the several produc- [fol. 45] ing districts would provide additional selling facilities for producers in those districts who were then and now are lacking adequate selling effort and representatives in the markets where bituminous coal was and now is offered for sale in competition with bituminous coal from the same and other districts and with other competitive fuels; the regional sales agencies would have sufficient working capital to provide adequately trained sales organizations with means to advertise the sale of bituminous coal in competition with competitive fuels; and they would help to overcome and eliminate the present wasteful uneconomic practices of producers shipping coal on consignment to destinations without having a purchaser for such coal, thus creating a surplus of distressed coal stored in railroad cars on which demurrage charges are accruing, and eventually forcing sales at prices below the cost of production and oftentimes at prices insufficient to pay the transportation cost.

The committee reported that they had taken the advice of counsel regarding the legality of working out certain consolidations or mergers of physical properties and the establishment of district or regional sales agencies, having sub-agents, and that they had been advised that such consolidations or mergers and the organization of regional or district sales agencies would be lawful. The committee further reported that under present conditions, where consolidations or mergers of physical properties could not now be made, the plan of organizing district or regional sales agencies was offered only as a general guide to effect some relief in the industry, but that each particular district [fol. 46] would be entirely free to consider this or any other plan it might desire, and that, in any event, the adoption of any particular plan would necessarily have to be undertaken separately and independently in each particular region or district and pursuant to such separate agreement

or agreements as might be determined by the several producers in such region or district.

In connection with their report, the committee submitted a suggested form of contract which was discussed, and which was approved for the purposes hereinabove stated.

Except as expressly admitted in the foregoing allegations, all of the allegations of paragraph V of the petition are denied.

VI

Answering paragraph VI of the petition, defendants, deny that it was pursuant to any plan, as described in the allegations of paragraph V of the petition (hereinabove denied) that representatives of producers of high volatile bituminous coal in the Appalachian territory, or that any of the defendants herein, prepared a charter for the defendant Appalachian Coals, Inc., a form of stock subscription agreement, a form of contract to be entered into between it and coal producers and a form of contract to be used by it when employing sub-agents; and the defendants deny that any concerted action whatsoever was taken by them, or any of them, pursuant to any plan proposed or recommended at a meeting held in December, 1931, at the City of New York, or elsewhere.

Defendants admit that on December 30, 1931, a general meeting of certain operators of high volatile bituminous [fol. 47] coal mines in the Appalachian region was held at Cincinnati, Ohio; that such meeting considered the information, reports and the work of meetings held in New York on December 3, and December 11, 1931, but that the action taken at the meeting in Cincinnati was independent of those meetings and in no wise pursuant to any plan adopted at the said meetings in New York City.

Defendants admit that at the said meeting held in Cincinnati on December 30, 1931, the operators there present, including representatives of many of these defendants, acting by themselves and independently of any other producers of bituminous coal and independently of the action of any other persons, caused to be organized the defendant, Appalachian Coals, Inc., and caused to be prepared by-laws for such corporation, as well as forms of subscription agreements for use in subscribing to shares of the capital stock of Appalachian Coals, Inc., a form of contract

between coal producers and Appalachian Coals, Inc., appointing it sales agent, and a form of contract under which Appalachian Coals, Inc., would employ sub-agents as distributors of coal to be sold by Appalachian Coals, Inc.

Defendants deny that there is, or that the defendants are parties to, any general plan, the operation of which is proposed, which has for its purpose regulating the supply, distribution and price of bituminous coal in interstate commerce in the United States; but, on the contrary, defendants aver that it was intended by the organization and operation of Appalachian Coals, Inc., to hold and, if possible, expand existing coal consuming markets in competition [fol. 48] with coal produced by others than the defendant producers, as well as by producers in other fields and in competition with other competing fuels.

Defendants admit that at the meeting held on January 27, 1932, in Cincinnati, it was agreed that the particular plan for the operations of Appalachian Coals, Inc., and the agreements for the purchase of shares of stock of Appalachian Coals, Inc., and appointing it a selling agent should not become binding and effective until operators producing, according to 1931 estimates, at least 70% of the coal mined in the Appalachian territory should execute and deliver similar contracts with Appalachian Coals, Inc.

Defendants admit that at a further meeting of the producers in the Appalachian territory held on March 1, 1932, in Cincinnati, Ohio, actions were taken substantially as alleged in paragraph VI of the petition.

VII

Defendants admit the allegations of paragraph VII of the petition, if the allegations therein are construed as meaning that the issued common stock of Appalachian Coals, Inc., has been fully paid for in cash, which defendants aver is the fact.

VIII

Answering the allegations of paragraph VIII in the petition, defendants repeat the denial that it was pursuant to any plan having for its purpose regulating the supply, distribution and price of bituminous coal in interstate commerce in the United States, as alleged in paragraph V of

the petition (hereinabove denied) that each producer has [fol. 49] entered into a uniform contract with Appalachian Coals, Inc.

The defendant producers admit that they have entered into contracts appointing Appalachian Coals, Inc., as their exclusive agent for the sale of coal (except deliveries on outstanding contract and coal used in the operation of their mines or sold to their employees) produced at their respective mines in the Appalachian territory; and the defendants aver that a true and correct copy of the form of such contract is included in Exhibit A annexed hereto and they respectfully refer this Honorable Court to the same for a full and complete statement of the terms thereof. Defendants further admit that none of the defendant producers has given notice of the cancellation of the contract.

Defendants deny that at the present time there are many hundreds of persons, firms and corporations engaged as agents, sub-agents, jobbers, brokers and dealers in selling and dealing in the coal produced by the defendant producers; but the defendants admit that there are many persons, firms and corporations so engaged, and they aver that most, if not all of these persons, firms and corporations for many years prior to the filing of the petition herein have been, now are, and in the future will continue to be, engaged in selling coal produced by defendant producers and others than the defendant producers; that nothing done or proposed to be done by the defendants is either intended or will have the effect of interfering with the rights of these persons, firms or corporations or excluding them from exercising the same; and that many of the persons, firms and corporations so engaged may be designated [fol. 50] as sub-agents of Appalachian Coals, Inc., in accordance with the provisions of the agreements between defendant producers and Appalachian Coals, Inc., as hereinabove described; and the defendants further aver that under the contracts entered into between the defendant producers and Appalachian Coals, Inc., no restraint whatever is or will be imposed upon the freedom of Appalachian Coals, Inc., to sell or to deal with any classes of purchasers, consumers of bituminous coals or other customers on any terms.

Defendants admit that the form of contract entered into by them with Appalachian Coals, Inc., authorizes the producer to designate at any time any persons, firms or corporations to act as a sub-agent of Appalachian Coals, Inc., on the terms and conditions set forth in the form of sub-agents contract annexed thereto (included in Exhibit A annexed to this answer); and the defendants beg leave to refer to it for a full and complete statement of the terms and conditions thereof.

Defendants deny that it is intended that each defendant producer shall have not more than one sub-agent or, in a few cases, not more than two sub-agents, one for eastern deliveries and one for western deliveries; but, on the contrary, defendants aver that it is intended, and the form of contract between the defendants and Appalachian Coals, Inc., expressly provides, that there shall be no limitation whatever on the number of persons, firms or corporations who may be designated by the defendant producers to act as sub-agents of Appalachian Coals, Inc.

Defendants deny that tthe contracts between the defendant producers and Appalachian Coals, Inc., will not and are [fol. 51] not intended to reduce selling costs; but, on the contrary, defendants aver that, when and if such contracts become operative, the cost of producing, handling and selling bituminous coal under such contracts will not only be substantially reduced, but that unnecessary financial losses and wasted effort will be eliminated and the markets in which coal produced by the defendant producers is or may be offered for sale will be extended and expanded.

Defendants deny that, at the time the contracts were entered into between the defendant producers and Appalachian Coals, Inc., the usual commission for sale of Appalachian coal was 8% of the selling price f. o. b. at the mines; and they aver that a large number of such defendant producers are, and for some time past have been, paying commissions of 10% and in excess thereof and that under many existing agency contracts the minimum commission of 10¢ a ton results in the payment of commissions at present prices far in excess of 10%.

IX

Answering the allegations of paragraph IX of the petition, the defendants repeat their denial that at the meeting

held on December 3, 1931, in the City of New York, any plan was approved the purpose of which was to regulate the supply, distribution and price of bituminous coal in interstate commerce in the United States; but the defendants admit that at such meeting there was approved a so-called "Regional Sales Agency Plan" as a suggestion to be made to independent coal producers, some of whom it was hoped might find the Plan adaptable to the needs of [fol. 52] their particular producing districts; and the defendants beg leave to refer to a true and correct copy thereof, which is hereto attached marked "Exhibit B."

Further answering paragraph IX the defendants deny that the Chairman of such meeting appointed a committee in each producing district to procure, if possible, the adoption of any plan having for its purpose regulating the supply, distribution and price of bituminous coal in interstate commerce in the United States; but the defendants admit that a meeting was held on December 3, 1931, in the City of New York, called for the purpose of receiving the report of the Committee of the result of their consideration of the several plans for improving the chaotic and deplorable conditions existing in the coal industry, and that it approved the suggestion made by the Committee that the organization of regional or district sales agencies provided the best available means for the immediate relief and preservation of the industry; the defendants further admit that the Chairman of the meeting who has no interest in or association with any of the defendants herein, named a committee in each bituminous coal-producing district or region east of the Mississippi River so that there might be explained to the local producers the idea of the regional sales agency plan as discussed at the meeting in New York City, but which would leave the matter, as to action on any particular plan, to the producers in each region. Defendants aver that there was no understanding or agreement that the several committees so appointed should act in concert or by agreement with other committees; and that on [fol. 53] the contrary it was at all times recognized that any such action in concert or by agreement with other committees or districts, might be illegal and was, therefore, to be avoided; that the main purpose of designating such committees was to enable certain individuals who had attended the New York meetings and had first hand knowledge of

the action taken in the New York meetings to discuss the problem with the local producers in particular regions, so that they might have the benefit of the views expressed at such meetings and take such action thereon as would be best suited to conditions existing in their particular regions.

Defendants further aver that the committees so appointed were, in most cases, composed of representative producers in particular regions who, for some time past, had been meeting more or less informally to consider common problems such as adjustments of freight rates and other common problems affecting the producers in particular regions; and the defendants aver that the committee appointed for the group represented in the Appalachian region consisted of representative producers who, for many years prior thereto, had worked as a group on matters affecting adjustments of freight rates and other matters of common interest to the producers in the Appalachian region.

Further answering paragraph IX of the petition, the defendant producers in the Appalachian region have no personal knowledge of and had nothing to do with the actions taken in districts other than the Appalachian region regarding the formation of regional sales agencies; [fol. 54] the defendants therefore neither admit nor deny the allegations of paragraph IX of the petition regarding the actions taken by operators in regions other than the Appalachian region and leave the petitioner to make its proof thereof as alleged.

Defendant producers and Appalachian Coals, Inc., deny that they have entered into any conspiracy, plans or contracts for the purpose or with the effect of restraining interstate trade and commerce in bituminous coal or of monopolizing or attempting to monopolize the same. The defendants deny that any of the acts done or proceedings taken by the defendants are in violation of the law; and therefore the defendants deny that there are any contracts entered into by the defendants which ought to be restrained or prohibited by this Honorable Court in this proceeding.

Defendants have no knowledge whether contracts similar to those entered into between the defendant producers and Appalachian Coals, Inc., will be executed forthwith and put into effect in each of the principal districts pro-

ducing coal which is actually or potentially competitive with coal which will be sold by Appalachian Coals, Inc.

Defendants deny that the contracts between the defendant producers and Appalachian Coals, Inc., were entered into with the intent on the part of the defendant producers, or upon the understanding amongst them and the operators in other fields, that within a short time after Appalachian Coals, Inc., shall have commenced actual operations or been declared legal by the Courts, a similar selling [fol. 55] agency plan will be created and established in each of the other principal producing fields for the purpose of controlling and limiting the supply, distribution and prices of at least 70% of the coal produced in each of such fields and sold, distributed and shipped in interstate trade and commerce as alleged in paragraph IX of the petition herein; but, on the contrary, it was intended that Appalachian Coals, Inc., should operate as a selling agent regardless of whether other selling agencies were formed or not; and the defendants aver that each and all of these allegations contained in paragraph IX of the petition are in all respects false and untrue. The defendants deny that there is any understanding whatsoever between them and the operators in other fields that any selling agency plan will be entered into by them in each of the other producing fields for the purpose of controlling and regulating supply, distribution and prices of any bituminous coal produced in each of such fields and sold and shipped in interstate trade and commerce in the United States or between the United States and foreign countries; and the defendant producers aver, on the contrary, that in entering into contracts with Appalachian Coals, Inc., they intended and do intend to proceed with the performance of such contracts irrespective and independently of any action that may or may not be taken in any other producing fields.

X

Answering paragraph X, the defendants admit that government reports of the total bituminous coal production in the United States in 1913 and since 1918 are as shown in [fol. 56] the table set forth in such paragraph; and the defendants aver that the sharpest decline in the production, sale and consumption of bituminous coal has occurred since 1929 and that such decline is still continuing.

Defendants deny that the average spot price of bituminous coal in December, 1931, was about 20% above the average spot price in 1913 and aver that there has been a substantial decline in the average spot price of bituminous coal during the past ten years.

Defendants admit that the value of bituminous coal is low in comparison with the cost of transportation, but deny that certain fields are therefore able to dominate certain consuming markets. Defendants also deny that producers in fields in which the average cost of production is low are able to dominate certain markets to which they have no, or an adverse, freight differential, for the reason that at the present and for some time past, coal has been and is being offered in all markets below the cost of production.

Defendants deny that the average cost of production in Appalachian territory, due primarily to labor costs, is substantially lower than in the other fields of Indiana, Illinois, Ohio and Pennsylvania. On the contrary, the defendants aver that the average cost of production in the Appalachian territory is higher than the cost of production of many of the producers located in other producing fields.

The defendants say that for some purposes some Appalachian coal is superior in quality to some of the coal pro- [fol. 57] duced in Indiana, Illinois, Ohio and Pennsylvania, and that the converse is also true, but the defendants deny that the pig-iron and glass industries can and do use Appalachian coal exclusively. The defendants deny that these industries cannot and do not use coal produced in Indiana, Illinois, Ohio and Pennsylvania because of its sulphur content, and on the contrary, defendants aver that the pig-iron and glass industries can and do use bituminous coal produced in Indiana, Illinois, Ohio and Pennsylvania, and other districts. Defendants admit that production of bituminous coal in the states in which the Appalachian territory lies (Kentucky, Tennessee, Virginia and West Virginia) was approximately 99% higher in 1929 than in 1913 and that the total production in Indiana, Illinois, Ohio and Pennsylvania was approximately 30% lower in 1929 than 1913, but the defendants aver that the total production in the Appalachian territory in the years subsequent to 1929 has declined substantially.

The defendants admit that the principal markets for Appalachian coal are, in order of importance, coal for railroad deliveries for consumption in the territory North and West of the Ohio River, railroad fuel sales, Lake Port deliveries, tide-water deliveries, deliveries within the State of Virginia, North Carolina, South Carolina and Georgia, sales to local trade and production of coke at mines; that substantially all of the tide-water shipments go to New England and New York State; and that large quantities are delivered in the markets of Ohio and Michigan. The defendants have no knowledge or information regarding the consumption of bituminous coal in the several cities in the State of Ohio and in the State of Michigan mentioned [fol. 58] in paragraph X in the petition and therefore leave the petitioner to make its proof thereof.

Defendants deny that the bituminous coal output of important producing fields, other than the Appalachian region, is competitive with Appalachian coal in substantial quantities in only a few market areas; but, on the contrary, defendants aver that the bituminous coal produced in all of the other producing fields is generally competitive with bituminous coal produced in the Appalchian fields in substantial quantities in substantially all of the marketing areas in which Appalachian coal is sold.

Defendants allege that although Appalachian coal is sold in substantial quantities in all of the states mentioned in paragraph X of the petition, the exact quantities of which are unknown to the defendants, if and when Appalachian Coals, Inc., shall commence operations, the percentage of Appalachian coal sold by this defendant will meet active competition from (a) coal produced by other producers in the Appalachian fields who have not entered into contracts with Appalachian Coals, Inc., (b) coal produced in all other fields producing bituminous coal, and (c) all other competitive fuels, such as fuel oil, anthracite, wood, gas and electricity, the production, sale and consumption of all of which have been and now are constantly increasing.

Defendants deny that the production of bituminous coal west of the Mississippi River is wholly noncompetitive with coal produced in the Appalachian fields except in the Iowa market.

[fol. 59] Defendants deny that in the important producing fields east of the Mississippi River, other than the

West Virginia smokeless field, the production competes with Appalachian coal in substantial quantity only as shown in the tables set forth at the end of paragraph X of the petition; but on the contrary defendants aver that coal from all of the important producing fields east of the Mississippi actually competes with the production of the Appalachian fields in substantial quantities in all of the markets in which Appalachian coals are sold.

XI

Defendants neither admit nor deny the allegations contained in paragraph XI of the petition, but leave the petitioner to make its proof thereof at the trial of this cause.

XII

Defendants admit that the total production of coal in the Appalachian territory is substantially as alleged in paragraph XII of the petition; but defendants say that the total annual installed productive capacity of producers located in the Appalachian territory who do not contract with Appalachian Coals, Inc., is 60,000,000 tons, equal to approximately 75% of the total annual production of all mines located in the Appalachian territory.

Defendants have no knowledge whether numerous other producers in the Appalachian territory who have not yet contracted to sell their coal exclusively through Appalachian Coals, Inc., will enter into such a contract if the [fol. 60] legality thereof is sustained in this proceeding.

Defendants deny that Appalachian Coals, Inc., will at any time control not less than 75% or probably at least 80% of the total production of *noncaptive* mines in Appalachian territory; and defendants deny that the output of producers in Appalachian territory who have not yet agreed to sell their coal to Appalachian Coals, Inc., is, in general, comparatively small.

XIII

Answering paragraph XIII of the petition, the defendants deny that the principal purpose of defendant producers in contracting with Appalachian Coals, Inc., for the exclusive sale of coals produced by them is to obtain a higher average price for their output than would be possible with-

out such contracts. Defendants aver that the price at which Appalachian Coals, Inc., and its sub-agents may sell coal of the defendant producers shall at all times be determined by competitive market conditions over which neither the defendant producers nor Appalachian Coals, Inc., will have control, and the defendants further aver that at all times coal of the defendant producers sold by Appalachian Coals, Inc., and its sub-agents will compete with (a) the high volatile bituminous coal produced by all of the other producers in the Appalachian fields who have not and do not intend to enter into contracts with Appalachian Coals, Inc., (b) bituminous coal and other coal produced in all other fields, the sale of which competes directly in the same markets [fol. 61] with coals which will be sold by Appalachian Coals, Inc., and (c) other competitive fuels.

Defendants deny that there is any purpose or that the effect of the agreements entered into with Appalachian Coals, Inc., is, or will be, to eliminate free competition in the sale of bituminous coal; but, on the contrary, defendants aver that such competition will be continued and will be strengthened thereby; that such competition should become more active thereby because it will be conducted on a more thorough and intelligent basis with a greater knowledge of actual market conditions; that by reason of the elimination of useless waste and uneconomic practices, a larger number of producers will continue to be able to offer their coal in the competitive markets which, if not sold below cost of production, will enable them to continue to employ and to pay reasonable wages to labor to advertise their products and thus extend and promote the sale of additional quantities of bituminous coal to consumers and users who are now purchasing other coals and competitive fuels in preference to high volatile bituminous coal, due to the lack of any stability in the prices at which this coal has been and now is offered in the markets.

Defendants deny that they have agreed, in substance, to limit production to the quantities fixed and determined by their common selling agent or by Appalachian Coals, Inc.; and they deny that there has been any agreement whatsoever to limit production to any fixed amount. On the contrary, defendants aver that Appalachian Coals, Inc., has agreed to use its best efforts to sell all the coal produced by [fol. 62] its members; that the quantities of coal to be pro-

duced by the defendant producers will be controlled entirely by the market demand and that one of the greatest benefits to be derived from the operations of Appalachian Coals, Inc., will be that the quantity produced will be more directly and accurately in response to the actual market demands and requirements of consumers.

Defendants deny that they entered into any combination whatsoever to increase the average price received for their output and, therefore, deny that the intent or the necessary effect of the contracts entered into between the defendant producers and Appalachian Coals, Inc., will be to increase the average price received for their output; and they deny that they anticipate or intend that any increase in prices will be made effective by the adoption of a common selling agency plan in any other producing region. Defendants deny that any action taken by other producing regions is intended or that the effect thereof will be to increase the average price at which coal produced outside of the Appalachian territory is offered for sale in competition with the defendant producers. Defendants aver, on the contrary, that at all times the prices to be received, not only by the defendant producers through their contracts with Appalachian Coals, Inc., but also the prices to be received by the producers in other fields producing and selling coal in competition with the producer defendants and with Appalachian Coals, Inc., will be controlled entirely by the competitive market conditions existing in the several markets in which such coal is offered for sale.

[fol. 63] Defendants deny that any action taken by themselves or by other producers in the Appalachian or any other producing regions for the adoption of any plan for regional sales agencies in such other producing regions will bring the production in other areas under control; and they deny that it will decrease the supply of coal offered for sale and sold in competition with coal of the defendant producers. The defendants deny that anything that has been done or proposed to be done by the defendant producers or by other producers in the Appalachian field, or in other producing fields, will in any respect whatsoever, bring production under control or decrease the supply of coal, but that at all times the quantity produced and the supply offered for sale will be determined by the requirements of

consumers and the conditions prevailing in the markets in which bituminous coal is offered for sale.

Defendant producers deny that they have adopted any common selling agency plan or have entered into contracts with Appalachian Coals, Inc., as a device and instrumentality to enable them to put an end to all competition among themselves in the sale of their coal in interstate and foreign commerce, or to control the supply, distribution and price of Appalachian coals sold or offered for sale in such commerce; and they deny that such contracts will directly or indirectly restrain interstate and foreign commerce in the coal produced by the defendant producers.

Defendants deny that through the instrumentality of their uniform contracts with Appalachian Coals, Inc., they have agreed that each will designate only one sub-agent or in a few cases two sub-agents for the sale of this coal; [fol. 64] but, on the contrary, defendants aver that, as provided in the contracts with Appalachian Coals, Inc., each producer has the right to appoint any persons, firms or corporations to act as a sub-agent or sub-agents of Appalachian Coals, Inc.; that no limitation whatsoever has been placed upon the number of sub-agents that may be designated; and that no restriction has been placed upon the freedom of Appalachian Coals, Inc., to sell to or deal with any class of customers on any terms. Defendants deny, therefore, that the necessary effect of the agreement between the defendant producers and Appalachian Coals, Inc., is or may be in any respect whatsoever, by concert of action, to exclude from the business of selling in interstate commerce coal of the defendant producers, any coal agent, jobber, dealer or broker whatsoever.

Defendants aver, on the contrary, that the coal agents, jobbers, dealers and brokers who are now engaged in the business of selling coal may continue, irrespective of any contracts between the defendant producers and Appalachian Coals, Inc., and irrespective of any action taken by these defendants, to handle and sell coal produced by the defendant producers as well as other producers; that such agents, jobbers and dealers may in all respects continue to furnish and sell consumers and users of high-volatile bituminous coal all their requirements without any hindrance or interference by the defendant producers; and that they may continue to exercise each and all of their rights with-

out any power or ability on the part of the defendants herein to exclude them therefrom or to impose upon them [fol. 65] any stipulated terms or conditions upon which they may or shall carry on their respective businesses.

Defendant's Separate and Complete Defense

As their separate and complete defense to the petition, the defendants respectfully aver and show:

1. The coal industry is one of the basic industries of the United States. Coal is one of the daily necessities of life. It is, therefore, of vital importance to the public that it have available at all times an adequate and dependable supply of the various kinds of coal needed. The public cannot be reliably and adequately so served by an industry which permanently, or during a protracted period, sells its product below the cost of production, or at prices that do not yield a reasonable profit on investment, as has been, and is, the case in the coal industry. The interest of the public will be best served by the elimination of ruinous, unfair and uneconomic practices which now prevent the operation of this industry on a sound basis, as a result of which elimination the public will be adequately and reliably served, producers will receive a reasonable return on their investments, and labor will receive fair remuneration for its services.

2. For many years prior to the filing of the petition and prior to the New York meeting of December 3, 1931, the condition of the bituminous coal industry, as a whole, was deplorable, in that bituminous coal was being sold everywhere at ruinously low prices, at or below the cost of production in many instances, producers were receiving no [fol. 66] return on investments and labor was suffering from constantly falling wages. This condition of the industry and the causes therefor are matters of common knowledge, namely: For a long period of years, ending with 1920, the consumption of bituminous coal in the United States had doubled every ten years, and the coal industry had adjusted itself to investment and development on that basis. The World War had suddenly brought about a great increase in the demand for coal. That abnormal demand caused an unprecedented increase in the productive

capacity of the coal mines, both by development of existing mines, and by the opening of new mines. This increased demand for coal was naturally followed by an increase in prices, which further stimulated the development of the productive capacity of the mines. The war shortage in the supply of coal, and the increase in prices, stimulated efforts to economize in the use of coal and brought about the discovery, development and use of more efficient methods of combustion. It also stimulated the use of competitive and substitute fuels and sources of energy, such as oil, natural gas and hydro-electric power. With the cessation of war and post-war abnormal demands for coal, the industry was left with a great excess productive capacity, and a greatly reduced demand for coal. In addition, the economies developed in the combustion of coal and the inroads of substitute fuels and sources of energy in the coal market, as aforesaid, have continued in full force and effect down to the date of the filing of the petition herein. These causes resulted in a period of cut-throat competition among coal producers for participation in filling the [fol. 67] reduced demand for coal. Except for short intervals of better prices, due to temporary causes, these conditions have continued down to the present. The result has been that prices of bituminous coal continued to decline until they reached and have remained at the point where there is not only no return on invested capital, but losses to an increasing number of coal producers, ending in bankruptcy to many. Furthermore, unfair trade practices were introduced in the selling of coal and wasteful and uneconomic methods of producing and selling coal became prevalent.

3. It was this condition of the industry that brought about the New York meetings. The New York meeting of December 3, 1931, followed a similar meeting held in that city on October 21, 1931. During the summer and fall of 1931 there had been widespread discussion in the various coal-producing states among public officials and others with respect to the depressed condition of the coal industry, and as to the possibility of doing something to better it. State officials recognized that the financial welfare of the great coal-producing states was seriously threatened, and they inaugurated this movement to improve conditions in the

coal industry. Definite suggestions to this end were made by state officials in Pennsylvania, Kentucky, and other states, and later in West Virginia. These movements demonstrated that the public generally was as vitally interested in the improvement of the coal industry as were the coal producers themselves. Prior to the first meeting in New York the Governor of West Virginia called a meeting of coal operators in his state to consider these questions. [fol. 68] By resolution that meeting requested the President of the National Coal Association to call a conference for the purpose of discussing the whole situation. A conference was called, and resulted in the first New York meeting, which was held on October 21, 1931. The meeting of December 3, 1931, referred to in the petition, was only a continuation of the meeting of October 21, 1931.

4. Defendants believe, and therefore aver, that the meetings held in New York were attended by persons having the fullest knowledge of the deplorable conditions existing in the coal industry. The persons in attendance at these meetings were experts, met to study the serious condition of this basic and vital industry, and, if possible, to make some suggestions for its betterment. They were, therefore, acting in the interest of the public and of the states, as well as in the interest of those engaged in producing and selling coal. It was realized by all in attendance at those meetings that the problem was bigger and broader than the promotion of the selfish interests of individuals who were engaged in the business of producing and selling coal, and that it involved the economic welfare and life of this great industry in the coal-producing states, in which three parties—coal producers, labor and the general public—are vitally and equally interested. The questions involved were examined, discussed and considered by this body of experts as a scientific problem and in a scientific way, with the hope of at least ameliorating conditions in the interest of all concerned. A great variety of plans and suggestions were examined and analyzed.

[fol. 69] 5. Defendants further say that the regional sales agency plan approved at the New York meeting of December 3, 1931, was simply the expression of the best judgment of those present as to what the producing districts, themselves, could do to better the conditions under which they

labored. The practice of selling coal through agencies has been long established in the bituminous coal industry, and the development of the regional sales agency plan was simply the application of an old principle. The New York meeting represented no one except the individuals participating in it. Their action was not binding on anyone. They simply reached the conclusion, after days of discussion, that the industry as a whole and as a unit could do nothing; but that separate regions might help themselves by adopting the general principle of the regional sales agency plan. The form of contract approved and suggested at the New York meeting was not, and was not intended to be, fitted for any particular district or binding on anyone, but was simply a form embodying a principle which it was suggested each separate region might consider and adapt, if deemed proper, to its own peculiar local conditions. When this was done, the functions of the New York meeting of December 3, 1931, ended. It never reconvened, and there was no connection between it and any region which considered the plan it had suggested. It was realized that each separate region would have to adopt its own plan and conduct its own agency, if any, in its own way, and there was no understanding, agreement, requirement or even expectation or thought that there would ever be any joint action between the separate regions which might consider [fol. 70] or adopt this plan. The averments of the petition, in so far as they refer to a general understanding and agreement that the various regions would afterwards act together in some undisclosed way, are contrary to the facts. The New York meeting of December 3, 1931, approved a report made to it by a special committee. That report and suggested form of contract, legal opinions of counsel thereon, and certain other data, were published in a pamphlet entitled, "The Regional Sales Agency Plan, Approved at the New York Conference, December 3, 1931." Defendants file herewith as a part of this answer a true copy of said pamphlet, marked "Exhibit B."

6. Certain individuals present at the New York meetings were interested in coal companies operating in what is described in the petition as the Appalachian Region. As members of the New York meeting, they had discussed and approved the general regional sales agency plan, and they

afterwards called a meeting of those interested in coal operating companies in the Appalachian Region, to be held at Cincinnati, Ohio. That meeting was largely attended, not only by coal producers and others directly interested in the coal industry, but by many business men and public-spirited citizens not directly connected with the coal industry. It was generally considered by citizens of that region as a meeting held in the interest of the public at large, and that any action taken benefiting the coal industry would benefit all business and the public. Committees were appointed, other meetings of committees and of operators were held, all of which eventuated in the organization of the defendant, Appalachian Coals, Incorporated.

[fol. 71] 7. Under date of January 27, 1932, there was published a pamphlet entitled, "Plan of Organization of Appalachian Coals, Incorporated," which contains a general statement with respect to matters considered and actions taken at the Cincinnati meetings, a copy of the certificate of incorporation of Appalachian Coals, Incorporated, copies of proposed contracts, and other data pertinent thereto, a copy of which pamphlet is attached hereto as a part of this answer, marked "Exhibit A."

8. The defendants further say that the contracts entered into between the defendant, Appalachian Coals, Incorporated, and the other coal-producing defendants contain no agreement, actual or implied, for the regulation or the control of production, or for the fixing of the prices at which coal shall be sold. These contracts are plain agency contracts under which the defendant, Appalachian Coals, Inc., agrees to use its best efforts to sell the coal produced by the other contracting parties at the best possible price obtainable in the markets where sale of said coal can be made; and these contracts differ in no wise from other and usual agency contracts heretofore in general use in the bituminous coal industry.

9. The defendants further say that the fact that the defendant, Appalachian Coals, Inc., will act as the common selling agent for numerous bituminous coal producers, will tend to stabilize the bituminous coal industry in the section where said coal is produced and in the markets where it is sold, in various ways, among which are the following: dupli-

cation of sales effort will be lessened; there will be cheaper and more effective advertising per unit cost; unfair trade practices will be eliminated; through advertising and re-
[fol. 72] search, there will be greater knowledge on the part of the public as to the proper uses of coal and the manner of using same, with the effect of increasing the demand for coal. Economies will also be effected in the actual selling of the coal, in its preparation for the markets, and by standardizing the preparation and the sizing of coal.

10. Defendants further say that they have entered into no contract, or contracts, agreements or understandings, other than those herein described, and that the purpose and effect of said contracts, as hereinabove set forth, are lawful and are not intended to operate, and in fact will not operate, to restrain interstate trade in coal, or create, or tend to create, a monopoly.

16. The defendants further say that their coal is not sold in any market and will not be sold in any market by the defendant, Appalachian Coals, Incorporated, where it does not come into free and keen competition with other coals produced in the same region in which it is produced, with other coals produced in other coal-producing regions (except in markets entirely local to a particular coal-producing district) and with other forms of fuel and sources of energy, so that the defendant, Appalachian Coals, Inc., will have no power to fix market prices or to cause an enhancement of such prices by any limitation of production. On the contrary, the prices at which Appalachian Coals, Incorporated, will be able to sell said coal in each and every one of the markets aforesaid, will be determined by the competition which it will meet, as above set forth. Similarly, the amount of coal produced by the defendant producers will not be determined
[fol. 73] by any limitation imposed by Appalachians Coals, Incorporated, but only and solely by the amount of coal which Appalachian Coals, Incorporated, using its best efforts, is or will be able to sell under the competitive conditions aforesaid.

12. The defendants further say that under the conditions herein set forth, the carrying into effect of the contracts herein described, instead of operating to restrain trade, will,

in fact, promote interstate trade and commerce in bituminous coal.

Wherefore the defendants pray this Honorable Court that this petition be dismissed as to all the defendants, that they be awarded their costs and disbursements, and such other and further relief as to the Court may seem just and proper in the premises.

And the defendants shall ever pray.

Edgar L. Greever, William J. Donovan, Esq., Edgar L. Greever, Esq., Solicitors for the Defendant. Horace R. Lamb, Esq., Ralstone R. Irvine, Esq., Otto C. Doering, Esq., of Counsel.

Dated July 18, 1932.

[fol. 74] DEFENDANTS' EXHIBIT "A" FILED WITH ANSWER

Plan of Organization of Appalachian Coals, Incorporated

Approved at the Cincinnati Meeting of Appalachian Coal Producers December 30, 1931

Printed and distributed to Operators for immediate attention and consideration, and for action thereon at the meeting called for Cincinnati, Ohio, January 27, 1932.

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6. Form of contract between Appalachian Coals, Incorporated, and Sub-agents designated by the Producer, approved at the Cincinnati meeting, Dec. 30, 1931. This is Exhibit "C" with above contract 108
7. Form of Subscription Agreement to stock of Appalachian Coals, Incorporated, to be executed by the Producer, approved at the Cincinnati meeting, Dec. 30, 1931 110
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[fol. 76] Instructions to Producers

Appointing Appalachian Coals, Incorporated, as their Selling Agent

1. Read all papers carefully.

2. Hold a Directors' meeting forthwith and adopt a resolution authorizing the contract with Appalachian Coals, Incorporated, and subscription of stock. A suggested form of resolution for this purpose is printed at Page 38 of the pamphlet. Be sure in the resolution to designate the name of the person or persons authorized to countersign stock subscription agreement.

3. Prepare carefully the information called for in Exhibits A and B attached to the Sales Agency Agreement. Be sure to fill in and attach these Exhibits as they are essential parts of the contract. Fill in all blanks in the body of the Sales Agency Agreement and in the Stock Subscription Agreement, but before filling in the blanks be certain that you understand exactly the matter to be filled in.

4. Immediately upon execution, deliver to your Group Chairman the following papers to be taken by him to the Cincinnati meeting and either delivered or withheld according to your instructions.

a. Sales Agency Agreement executed in duplicate by your company.

b. Subscription Agreement executed in duplicate by your company.

c. Certified copy of resolution of your Board of Directors authorizing contract and subscription agreement certified to by your secretary under seal of your company.

5. Send your authorized representative or representatives to the general meeting in Cincinnati on January 27th.

Basis of Subscriptions

1. Common stock—$1.00 par: 1 share for each producer, and in addition 1 share for each 100,000 tons of 1931 production or major fraction thereof over 100,000 tons. For example, a company producing 275,000 tons will subscribe 3 shares, and a company producing 245,000 tons will subscribe 2 shares. This subscription is payable on acceptance of the subscription.

2. Preferred stock—$100.00 par: based on average monthly production for 1931, and whether or not you expect to appoint a sub-agent. Examples:

(a) If you expect not to appoint a sub-agent, and your average monthly production was 10,000 tons, you subscribe 1 share for each 66-2/3 tons of your average monthly production, or 150 shares at $100.00 each, a total of $15,000.00, payable ¼ or $3,750.00 on acceptance of subscription, and the balance in three equal installments at not less than 30 day intervals.

(b) If you expect to appoint a sub-agent and your average monthly production was 10,000 tons, you subscribe 1 share for each 666-2/3 tons of your average monthly production, or 15 shares at $100.00 each, a total of $1,500.00, payable in installments as aforesaid.

By resolution adopted at Cincinnati, December 30, 1931, the Board was requested to accept notes for preferred stock subscriptions where cash payments can not be made.

[fol. 77] Foreword

At the New York conference of bituminous operators, called by the National Coal Association and held on De-

cember 3, 1931, a definite regional sales agency plan was formulated and submitted to the industry. The National Coal Association published and distributed a pamphlet entitled "The Regional Sales Agency Plan," containing the results of the conference, the opinion of Colonel William J. Donovan as to the legality of the plan under the Federal Anti-Trust Laws, and forms of contracts between individual producers and the regional sales agency and between the regional sales agency and sub-agents.

The material contained in this pamphlet must be considered in connection with the work of the New York conference. This pamphlet embodies the results of a general meeting of the southern producers held in Cincinnati on December 30th, 1931. A corporation named Appalachian Coals, Incorporated, has been set up to act as the selling agency for the producers in the southern fields. The charter, and by-laws, and the subscription agreement herein contained were approved at that meeting. In addition, some revisions were made in the forms of the contracts between producers and the sales agency and the sales agency and sub-agents and these contracts as so revised are likewise included. It is believed that the corporate structure of Appalachian Coals, Incorporated, and the contract forms herein set out are especially adapted to meet the problems of the southern producers, representing as they do the best judgment of the large majority of the operators in the field.

While, as above mentioned, Colonel Donovan has given his opinion that the plan herewith submitted does not violate the Federal Anti-Trust Laws, he has requested that the specific papers (all of which herewith submitted have been drafted under supervision of counsel) be resubmitted to him for final opinion. Due to the absence of Colonel Donovan in Europe this has not been done. He is returning to New York on the 13th of this month, at which time Mr. Greever will submit this entire proposal of Appalachian Coals, Incorporated, to Colonel Donovan for an opinion by him as to the legality of this plan under the Federal Laws; and will request him to furnish a written opinion, a copy of which will be available to all producers at or before the meeting is held at Cincinnati on January 27th.

By the Committee.

January 6, 1932.

[fol. 78] General Statement

To the Producers of Appalachian Coals:

After working several weeks through both general and subcommittees, a general meeting of operators, representing a great preponderance of the coal tonnage produced in that small area of Southern West Virginia, Eastern Kentucky, Southwestern Virginia and Eastern Tennessee, known as the Appalachian Region, at Cincinnati, Ohio, on December 30, 1931, decided to obtain and submit to you the charter of Appalachian Coals, Incorporated, granted under the laws of Delaware, and suggested by-laws adopted at the first meeting of the stockholders, as well as a form for coal producers to use in subscribing for stocks in Appalachian Coals, Incorporated, and agreed forms of contracts, (a) between the coal producers and Appalachian Coals, Incorporated, a general sales agent, and (b) standard form of contract which the general sales agent, Appalachian Coals, Incorporated, will use when employing sub-agents as distributors of coal which Appalachian Coals, Incorporated, has for sale.

This meeting of operators recommends to the operators producing Appalachian coals in the region described that they subscribe for stock and become stockholders in Appalachian Coals, Incorporated, and that they, as producers, enter into contracts with the said Appalachian Coals, Incorporated, employing it as sales agent for the coals of said producers, reserving the right as provided in the contract to designate a sub-agent.

It is believed that the following information will be useful and helpful to producers in the Appalachian coal field who desire to consider this proposition.

This coal field is composed of several small districts, locally known as Kanawha, Logan, Williamson, Big Sandy-Elkhorn, Hazard, Harlan, Southwest Virginia and Southern Appalachian, and lies in the counties of Kanawha, Boone, Logan and Mingo in the State of West Virginia; the counties of Pike, Floyd, Johnson, Letcher, Bell, Harlan, Perry, McCreary and Whitley in the State of Kentucky; the counties of Dickinson, Lee, Russell and Wise in the State of Virginia; and the counties of Anderson, Campbell, Fentress, Grundy, Marion, Morgan and Claiborne in

the State of Tennessee, with possibly a slight production on the borders of adjacent counties in each of the States named. The field lies almost entirely in a compact region composed of parts of 24 counties out of a total of *370* counties in the four states of Virginia, West Virginia, Kentucky and Tennessee.

These counties are all partly underlaid with coals suitable for steam, by-product, gas and metallurgical purposes, as well as for domestic uses. The coals in these counties are mainly on the lines of The Chesapeake & Ohio, Norfolk & Western, Louisville & Nashville, and Southern railroads, and their small subsidiary and connecting lines. More than 75% of this coal goes into the same markets on practically identical freight rates, and this district is one common district of origin with coals of similar qualities; and, while parts of these twenty-four counties are known by local names, from a commercial and marketing standpoint as well as from freight rate adjustment, they are one and the same district. All of these districts have worked together as one for a number of years on freight rate adjustments and other matters affecting the marketing of their coals.

The Cincinnati meeting, in recommending the organization of the Appalachian Coals, Incorporated, did so with the hope of bringing about a better and more orderly marketing of the coals from the region to be served by this company and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business. At [fol. 79] present the producers of this region are greatly handicapped by the lack of substantial, well equipped and well managed selling agencies with sufficient organizations and funds at their command properly to develop the markets and demand for coal from this region, and properly to sell and merchandise it in competition with the coals from competing fields, as well as with the rapidly increasing competition coal is meeting from the large and powerful gas and oil companies. As individual units the producers in this region have been and are now unable to carry on proper and extensive advertising campaigns and other means of holding and developing the markets for coal from this region. This inability is one of the con-

tributing causes to the great decline in tonnage in this region during the past two years.

It may be well to call attention to the fact that the year 1931, just ended, is the year of lowest production of bituminous coals since 1909. The production in that year amounted to 379 million tons. It is estimated that production for the past year will amount to approximately 376 million tons. When we compare this with the production of 467 million tons in 1930 and 534 million tons in 1929, and an average production from 1920 to 1930, inclusive, of 506 million tons, it is seen that a natural resource industry, producing one of the daily essentials of life, has dropped approximately 26 per cent under a ten-year average, and must necessarily have suffered greatly financially. This is particularly true when it is understood, so far as statistics are available, that no part of this bituminous coal industry in the United States has had any prosperous period since 1926, and did not share financially in the boom period of 1928-1929.

It is a well known fact that these conditions in the industry have been a matter of public concern to the President and the Congress, to the Governors and Legislatures of the coal producing states, and to bankers, business men and consumers generally, for the past decade. The subject has had careful consideration from the President and Congress during the last four administrations, and Congress spent several hundred thousand dollars in having a complete report made on this situation by the United States Coal Commission with the hope of finding some relief for this industry. The general sentiment seems to be that the first effort at the reform of the industry must come from within. The United States Coal Commission so recommended when it said, "The Commission realizes that the largest opportunity and the largest responsibility for putting the coal industry in order lie with the industry itself." And again, "Not through governmental coercion but through enlightened self interest of producers and consumers, is the real remedy to be sought. The coal industry can reform itself from within."

The Governors of many of the states have joined in conferences to discuss this matter for a period of years, but year by year and from time to time the condition of the industry has gotten worse down to and including 1931

when, so far as production is concerned, all the progress made in the past twenty-two years has been wiped out.

This is a vital matter confined not solely to this industry in which is invested approximately four billion dollars, for it employed in 1927 over 700,000 men and provided directly and indirectly a livelihood for more of our people than any other industry except agriculture, and provided our railroads with more than 25% of their tonnage as well as of gross revenue. An industry such as this, furnishing a necessity of life and employing directly and indirectly a substantial part of the country's labor, necessarily affects the general prosperity of the country as a whole; and it is thought by many that the abject condition of the coal industry is one of the contributing causes of the present distressed industrial conditions.

The average value of bituminous coal at the mines has dropped more than 50% during the past few years and has reached a point below the pre-war levels. Hundreds of [fol. 80] thousands of men have been thrown out of employment, and both the wages and working time of those remaining in the industry have been greatly reduced.

The local communities actually dependent upon the coal industry and the communities and business centers adjacent thereto have suffered more severely than those in any of the other industrial regions of the United States. Hundreds of mines in our region have closed through failures and bankruptcy; others have gone out of business to prevent bankruptcy. A large amount of useful and valuable coal has been lost and destroyed beyond the point of recovery. The effect of this condition in the bituminous coal industry has not been confined to the industry itself, but there has followed it an almost incalculable loss through the failure of banks, factories, mercantile establishments and individuals directly and indirectly connected with the industry, until almost every man and woman in this United States, knowingly and unknowingly, have been affected adversely by this situation. Taxable values have fallen so low that the state, county and municipal revenues have been reduced alarmingly. Schools and all other public institutions dependent upon such revenues are suffering from lack of necessary funds.

Facing conditions of this kind and following the recommendations of the various public officials, and forced by

the deplorable conditions which have existed in this industry for almost a decade, the leaders of the bituminous coal industry met in New York City in the fall of 1931 and worked out and recommended to the bituminous coal producers in the United States, generally, that they form and set up regional sales agencies in the various coal producing districts for the purpose of stabilizing the industry in the interest of the people employed and engaged therein, as well as for the good of the nation generally.

The object of this plan, which was carefully worked out by said committee under legal advice of E. L. Greever, Esquire, and of Colonel Wm. J. Donovan, of New York City, formerly Assistant Attorney General of the United States, is to stabilize the industry by bringing about a more wholesome and rational competitive condition in the selling and marketing of bituminous coal, with a view of protecting the producer, the laborer and the consuming public.

The plan provides for the formation of corporations to be organized in each of the principal competitive fields, to act as general selling agents for as many producers in such fields as desire to entrust their sales to them.

Committees were appointed to bring about meetings in the various producing regions; and two general meetings and a number of subcommittee meetings were held in the City of Cincinnati, Ohio. At the meeting of the operators held on the 30th of December, 1931, unanimous approval was given the suggestions of the general bituminous coal conference of New York, and it authorized the obtaining of a charter for a company to be known as Appalachian Coals, Incorporated, under the laws of Delaware, which is authorized to engage in the business of acting as a general sales agency for the producers in the region herein, and either to sell such coal direct through its own employees, or, where more efficiently and economically done, to sell same through existing and other sales agencies which might act as sub-agents for the general sales agent.

A committee, under direction of counsel, has prepared and obtained such charter under the laws of the State of Delaware, a copy of which follows this statement. The committee has prepared a suggested set of by-laws for such corporation, which is printed immediately following the charter. These by-laws are subject to revision by the [fol. 81] stockholders, and may be approved or changed

and modified by them. The temporary board of directors for such corporation has been named, and when they qualify, the company can commence business. This committee has also prepared a stock subscription contract which is self-explanatory and is printed hereinafter.

The general meeting at Cincinnati on December 30th recommended that each producer carefully read the plan adopted by the bituminous coal committee in New York on the 3rd day of December, 1931, and, as well, this statement and the charter and by-laws attached hereto and the agency contracts hereinafter set out, and recommends that the producers of this region subscribe to and become stockholders in the Appalachian Coals, Incorporated, on the basis set out in said subscription contract.

The contract between the producer and the general sales agency, the Appalachian Coals, Incorporated, is self-explanatory. The contracts to be signed by all the producing companies are to be the same in form, and all producers are to be given equal consideration.

A resolution was adopted by the meeting that the corporation have a board of directors of from sixteen to twenty-seven, not less than two being selected from each of the following groups of counties:

Kanawha and Boone (W. Va.), two (2); Logan (W. Va.), two (2); Mingo (W. Va.) and Eastern half of Pike (Ky.), two (2); Perry and North end of Letcher (Ky.), two (2); Floyd, Johnson, Western half of Pike, and Southern half of Letcher (Ky.), two (2); Dickinson, Lee, Russell and Wise (Va.), two (2); Harlan and Bell (Ky.), two (2); McCreary and Whitley (Ky.) and Anderson, Fentress, Grundy, Marion, Morgan, Claiborne and Campbell (Tenn.), two (2); and not more than nine (9) directors to be elected at large.

The purpose of this large directorate was to have a board of directors familiar with all of the coals and the selling problems of the regions represented, and who would inspire confidence in the ability and integrity of such agency, and who could keep in personal contact with the operators. These directors are all to be elected at a stockholders meeting to be held at Cincinnati, Ohio, on the 27th day of January, 1932, or at any adjourned meeting thereof, as the subscribers and stockholders of the corporation may decide at said meeting.

The management of the corporation will be placed in the hands of a board of directors, but it is contemplated that the board of directors will employ the best available executive as president of the corporation, to be employed for his ability, honesty and fairness; and that he, together with the board of directors, will select a sales staff consisting of Sales Managers or Vice Presidents, and other staff, to conduct the business of the corporation.

It is expected that the directors of this corporation will quickly build an effective and competent sales organization, and it is expected that the company will be prepared to do business about the first of March.

Control of this corporation will, of course, be in the hands of the stockholders and the management will be placed by them in the hands of the board of directors, who each serve for one year without compensation; and a board thus widely scattered can not be considered as susceptible to influence by any single producing interest or allied interests.

The problems to be met by this general agency are many and varied. Today coal from this region is being sold by more producers and agencies than there are producers. [fol. 82] Many of these agencies and producers engaged in the sale of coal fully realize that all sales are being made blindly without adequate information as to the cost of production and distribution of coals, the needs of the consumers and the actual competition to be met. The result is that intelligent competition, both between the producers in this region and the producers in competitive districts, has been destroyed and broken down. The consumers of industrial coal, competing with each other, have no assurance that they are at any time able to buy coal, which, in many cases, is a material part of the cost of production of manufacturing and industrial concerns, at a price comparable to that paid by their competitors. Retail dealers distributing coals are unable to know either the quality of the coals being offered them, or whether or not the prices at which coal is being offered them from day to day are prices at which they can safely store coal to supply their domestic customers. The buyers of coals as well as the sellers are demoralized, and reasonable competition is being destroyed for both the producer and consumer.

Under this plan it is not expected that competition will be eliminated, even between the coals sold by the general agency, but that the general agency will sell each producer's coal on the basis of a fair competitive price with the coal of each other producer employing the general sales agent. Each producer will receive for each grade of coal the price obtained for that grade, less the commissions to the sales agent, as provided in the sales agent's contract. It will be the purpose of the general sales agent to make competitive prices for the various kinds and grades of coal offered by it that will enable each producer to have equal opportunity, as near as conditions will permit, to move his coal freely in competition with other coals handled through the general sales agency; and that the prices will also be adjusted in competition with other competing regions supplying common markets, with a view of maintaining, and if possible increasing, the percentage of coal going from this region to the general consuming markets. The general agency will also be compelled to adjust prices to meet competition of those companies producing coals from the twenty-four counties described herein which do not sell through the general agency, with a view of maintaining for the producers selling through the general agency as large a relative volume of the business of this region as they now have. Under this plan competition will not only not be stifled, but it may even be intensified at certain points. By adjusting orders between the different producers who are short on certain grades and long on other grades of coal, by seeking intelligent information as to the demand and competitive conditions, and by reducing the cost of selling, it is expected that dumping of coal can be restricted and fair and intelligent competition maintained.

It is generally appreciated by all producers in this region that in practically every market reached by the coals to be sold through the general sales agent, such coals must reach the market in competition with coals having freight rate advantages varying from five cents to two dollars a ton. It is estimated that less than 6% of the coal mined in this region is sold at points where the producers of this region can reach the consuming market on equal or more favorable freight rates than apply from the mines in other regions with which they are in competition; that 75% of

the coal from this region is sold and consumed in the territory North and West of the Ohio River; that all this coal reaches the market at a freight rate disadvantage compared with rates from other producing regions, averaging from twenty-five cents to $1.50 or more per ton; that on the average the large producing coal states of Ohio, Pennsylvania, Indiana and Illinois have a freight rate advantage to all the consuming territory North and West of the Ohio River of from thirty to fifty cents a ton. For this reason, to maintain a place for Appalachian coals in the competitive markets against coals of comparable quality that can be produced at approximately the same or a lower cost, requires the most intelligent sales effort on the part of the producers in this region. All coals going to the South and Southeast territory are in similar active com- [fol. 83] petition, with less freight rate disadvantage, with coals produced in Alabama, the low volatile smokeless fields of West Virginia and Virginia, and, of course, with the producers in this region who do not elect to sell their coals through the general sales agent. The coals with which the coals from this region come in competition in the South and Southeast are among the highest quality coals produced in the United States or in the world, and it is only by active sales promotion and intelligent competition that the producers of this region can expect to maintain a place in these markets. On coals going Eastbound to Tidewater, for use along the North Atlantic Seaboard, we come first in direct competition with all coals produced in Pennsylvania, Maryland and Northern West Virginia, as well as with the low volatile coals in Southern West Virginia and Virginia. All the coal shipped to Tidewater from this region bears a higher freight rate than the coals going from the competing regions referred to.

In addition to competition with coals from companies not selling through the sales agency and from competing districts, the very large oil and natural gas companies are competing for the fuel requirements of both the industrial and domestic users in practically every market reached by the coals from this region. The public is being misled by the extensive advertising campaigns of these interests, and this publicity can only be met by intelligent cooperative advertising by the producers of this region at a cost pro-

hibitive to the individual producer. The producer who is content to sell his own coal against all these odds can not, it is evident, expect to survive in this unequal contest.

When it is considered that the six million tons shipped from this region for use within the states of West Virginia, Virginia, Kentucky and Tennessee constitute less than one-third of the total consumed therein in 1929, that the coal from this region meets in competition in every primary market with coals coming from other producing regions on lower freight rates and with an equal if not a lower production cost, that these competitive regions have adequate productive capacity to supply all the coal normally consumed in these competitive markets in addition to what they are already supplying, and that the entire coal production from this region could be closed down without creating any general shortage of coal in any of the primary consuming markets, it can not be contended that the formation of this company is not in promotion of a sane and sensible competitive situation.

The probable results of the successful organization and operation of the Appalachian Coals, Incorporated, will be:

1. As to the producer.

To create and establish a larger and more attractive market for the coals produced in this region, by better advertising of the coals, together with better demonstration of their advantages by competent combustion engineers.

By virtue of the larger volume of coals handled through the sales agency, to allow all producers to share in and compete for the larger and more attractive business in all primary markets.

By balancing grades to prevent dumping of any grade of coal at any time.

By adequate information as to the needs of industries, and as to the competition of other fields, to obtain the best available prices for all coals, based upon the merit of the product [fol. 84] sold, as against the present system of selling coals blindly without adequate information as to the needs of the consumer or the competition of other producers.

To give the coal consumers purchasing coal from this region the assurance that they are buying their fuel on a fair competitive price, and are paying no more for similar

coals and service than is being paid by their competitors, and thus secure for the producers of this region, permanently, business that is now part of the time going to other fields.

To increase the use of domestic coals by protecting the dealers with fair and uniform prices for different grades of coal over long enough periods to give the dealer an opportunity to buy, sell and merchandise the coals without the fear of sustaining serious losses due to dumping from the same producers in the same markets.

To protect the producers from serious credit losses by being able to get more adequate reports on the responsibility of the various consumers.

Ultimately to reduce the cost of sales to the producer by the elimination of duplication of service, by balancing grades, and by giving the producers more uniform running time and consequently a lower cost of production.

To give the mines of all producers more uniform running time as the result of better distribution of orders.

By the elimination of dumping and more intelligent selling as outlined herein, to increase the realization to the producer to a level that will enable the operator to pay labor as high a wage as the competitive conditions with coals in more favorably located freight rate zones or regions will permit.

2. As to the consumers.

To protect the general consuming public by conserving, insofar as possible, available supplies of the cheaper mined coal; to keep mines and labor available to supply the demands of the consumer when the return of normal business causes an increase of 25% to 50% in the current consumption of coal. It will require an increase of 33% in coal production over 1931 to bring production up to the previous ten-year average level; and during peaks of winter industrial demand consumption is occasionally 75% to 100% greater than the present production. Thus, the importance of keeping capacity available for the consuming public can not be overestimated.

Through careful planning, to give to each consumer the kind of coal best suited to his needs.

To show all consumers who may be using other fuels the economy and advantage of coal over all other fuels, and to

give consumers more satisfactory fuel at a lower net cost than they can get in any other form of solid fuel, or from oil or gas.

To assure each consumer and retail dealer that the price being made to him is a fair, equitable and stable price, and is a price at which he can operate his business in competition with coals sold by other producers or districts.

3. To the public, generally.

By stabilizing the industry, to stabilize likewise the economic conditions in communities dependent for their existence upon the coal industry in the Appalachian region.

[fol. 85] To stimulate commercial activities generally through a restored buying power in the mining communities.

To lessen, so far as practicable, the great amount of coal lost in the process of mining under the present haphazard methods of production and sale, and thus conserve a great natural resource for the future.

Producers of most of the coal in this region were present at the meeting in Cincinnati on December 30th, and this meeting unanimously voted to recommend to the producers and producing companies that they take immediate steps to present this matter to their directors, with the recommendation that they subscribe to both the common and preferred stock in the general sales agency in proportion to the tonnage produced by them, and that each company authorize the proper officers to enter into an agreement or contract with the general sales agent, the Appalachian Coals, Incorporated, in accordance with the general sales agency contract attached hereto; that both the stock subscription and the sales agency agreements, properly executed by each producer, be delivered in escrow pending a meeting of all similar producers and subscribers to stock in Cincinnati on January 27, 1932, at which time a statement will be prepared showing the name of each company subscribing for stock and executing the contract, the annual tonnage produced by each company so subscribing and the total number of companies and the total amount of coal subcribing for stock from each district. At the same time the committee would have available a list of the companies not signing, so as to show the number of companies not subscribing for stock or

contracting with the general agency for the sale of their coals, the names of such companies and the total amount of coal in the region to be sold independently of the general sales agent.

The contract provides that each producer, through properly designated officers or agents, shall have the authority to countersign and deliver stock subscriptions and contracts to the proper officers of Appalachian Coals, Incorporated, or to withdraw both stock subscription and contract if for any reason unsatisfactory to the producer and he desires to withdraw same.

The success or failure of this plan is in the hands of the individual producer. No producer can evade this responsibility and leave it to his neighbor. The question for each producer to decide is whether or not he is willing to cooperate with the other producers for the purpose of improving the status of the industry as a whole and his own individual interest, or if, by his attitude of trying to obtain some individual advantage for himself over others, he will destroy the entire industry. Each producer must realize that upon his individual action will depend the success or failure of this proposal. Before deciding definitely each producer will know who proposes to go in and who will stay out, and can make his decision accordingly.

[fol. 86] Certificate of Incorporation of Appalachian Coals, Incorporated

First. The name of the corporation is "Appalachian Coals, Incorporated."

Second. Its principal office in the State of Delaware is located at No. 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is The Corporation Trust Company, No. 100 West Tenth Street, Wilmington, Delaware.

Third. The nature of the business, or objects or purposes to be transacted, promoted or carried on are:

To mine coal on its own or leased premises; to buy and/or sell coal, as principal, in its own name and for itself, and/or as agent for others, for commissions or other remuneration; to buy or sell coal lands, mineral lands, mining rights; to purchase, own, sell and develop, lease, work and operate,

coal mines, coal lands, mineral lands, mining rights and coal property; to own and/or lease and operate coal yards, depots, and docks, and to engage in and to conduct a general merchandising business; to carry on the businesses of coal mining and merchandising in all of their branches, and to manufacture and sell coke and its by-products.

To institute, prosecute and develop research work for the purpose of increasing and broadening the use of coal and coal products, and to advertise the same.

To take, acquire, buy, hold, own, manage, finance, work, develop, sell, convey, rent, lease, mortgage, exchange, improve, and otherwise operate and deal in and dispose of real estate and buildings, or any interest or rights therein, without limit as to amount; to erect, construct and alter buildings and other structures; to make and enter into any and all manner and kind of contracts, agreements and obligations by or with any person or persons, corporation or corporations, and with or by this corporation, for the erection, construction, equipment, improvement, working, development, leasing, renting, repairing, management or control of any building and edifice of any kind whatsoever.

To conduct and carry on the business of builders and contractors for the purpose of building, erecting, altering, repairing or doing any other work in connection with any and all classes of building and improvements of whatever kind and nature, including the building, rebuilding, alteration and repair of houses, factories, works and erections and the building and repair of bridges, and to buy and sell and deal in roofing materials, building materials, including paints and oils, steel and iron and glass, and to do and perform any and all works as builders and contractors, and with that end in view to solicit, obtain, make and perform contracts covering the building and contracting business.

To acquire by purchase, subscription, contract or otherwise, to hold for investment or otherwise, to sell, exchange, pledge or otherwise dispose of, or turn to account or realize upon, and generally to deal in and with stocks, bonds and other evidences of indebtedness, and any and all other securities issued or created by corporations, associations, partnerships, firms, trustees, syndicates, individuals, governments, states, municipalities or other political or governmental divisions or subdivisions, or by any combinations,

organi-ations or entities whatsoever, or issued or created by others, irrespective of the form or the name by which [fol. 87] they may be described, and all trust, participation and other certificates of, and receipts evidencing, interest in any such securities and any and all personal property of every kind and description and wheresoever situated.

To borrow money and to issue bonds, debentures, notes or other obligations or securities of the corporation from time to time for any of the objects or purposes of the corporation, and to secure the same by mortgage, lien, pledge, deed of trust or otherwise. To loan money, and to act as agent or factor for any person, partnership, or corporation.

To manufacture, purchase or otherwise acquire, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in and deal with goods, wares, merchandise and personal property of every class and description.

To acquire, and pay for in cash, stock or bonds of this corporation or otherwise, the good will, rights, assets and property, and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm, association or corporation, and to become surety and/or guarantor on the obligations or liabilities of any person, firm, association or corporation.

To acquire, hold, use, sell, assign, lease, grant licenses in respect of, mortgage, or otherwise dispose of letters patent of the United States or any foreign country, patent rights, licenses and privileges, inventions, improvements and processes, copyrights, trademarks and trade names, relating to or useful in connection with any business of this corporation.

To organize and conduct a credit bureau, or bureaus, and to exchange credit information with others.

To enter into, make and perform contracts of every kind and description with any person, firm, association, corporation, municipality, country, state, body politic or government or colony or dependency thereof.

To borrow or raise moneys for any of the purposes of the corporation and, from time to time, without limit as to amount, to draw, make, accept, endorse, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable or non-negotiable instru-

ments and evidences of indebtedness, and to secure the payment of any thereof and of the interest thereon by mortgage upon or pledge, conveyance or assignment in trust of the whole or any part of the property of the corporation, whether at the time owned or thereafter acquired, and to sell, pledge or otherwise dispose of such bonds or other obligations of the corporation for its corporate purposes.

To purchase, hold, sell and transfer the shares of its own capital stock; provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital except as otherwise permitted by law, and provided further that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

To have one or more offices, to carry on all or any of its operations and business and without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the States, Districts, Territories or Colonies of the United States, and in any and all foreign countries, subject to the laws of such State, District, Territory, Colony, or Country.

To do any and/or all the things authorized to be done, through and by agents, and, where the corporation is itself acting as agent, to name, designate, and appoint sub-agents to act for it and in its stead, in the performance and doing [fol. 88] of any of the things it is authorized to do as agent.

In general, to carry on any other business in connection with the foregoing, and to have and exercise all the powers conferred by the laws of Delaware upon corporations formed under the act hereinafter referred to, and to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

The objects and purposes specified in the foregoing clauses shall, except where otherwise expressed, be in nowise limited or restricted by reference to, or inference from, the terms of any other clause in this certificate of incorporation, but the objects and purposes specified in each of the foregoing clauses of this article shall be regarded as independent objects and purposes.

Fourth. The total number shares of stock which the corporation shall have authority to issue is Ten Thousand

(10,000), of which shares One Thousand (1,000) shall be Common Stock of a par value of One Dollar ($1.00) each and Nine Thousand (9,000) shares shall be Preferred Stock of a par value of One Hundred Dollars ($100.00) each. The voting power for all corporate purposes shall be vested in the Common Stock exclusively, and each share shall be entitled to one (1) vote. The preferred stock shall be entitled to a cumulative dividend at the rate of seven per cent. (7%) per annum payable annually and shall be redeemable at par plus accumulated and unpaid dividends on March 1, 1932, or any dividend day thereafter, in such amounts and in such manner as the Board of Directors shall determine. In case of liquidation, dissolution or winding up of the affairs of the corporation, whether voluntary or involuntary, and after payment of all the debts of the corporation, the assets of the corporation shall first be applied to the payment of the preferred stock at par, plus an amount equal to arrearages of dividends, and the remainder shall be distributed among the holders of the common stock, share and share alike. Authority is hereby expressly granted to the Board of Directors, by resolution or resolutions, to determine the additional powers, preferences, and rights and the qualifications, limitations, or restrictions thereof not in conflict with the provisions of this paragraph or in derogation of the rights of common stock as herein set out, pertaining to the Preferred Stock, and subject to which the same shall be issued.

The By-laws of the corporation, or the Board of Directors by resolution, may in the issuance of Common Stock reserve to the corporation the option to repurchase such stock at its book value upon such contingency or contingencies as may be therein set out; provided, however, that no such option shall extend for a period of more than twenty years from the date of original issuance of such stock. The By-laws, or the Board of Directors by resolution, may further provide for the protection of the said option or options by prohibiting the transfer on the books of the corporation of any share or shares or certificate or certificates representing the same unless holder or holders thereof shall have first offered the same to the corporation in accordance with the option agreement. If the exercise of such option or options by the corporation would at the time it shall have the right to exercise

the same operate to impair its capital, the corporation may assign the option or options to any other record holder or holders of Common Stock selected by the Board of Directors. Any option so reserved by the corporation shall be printed on the face or reverse side of the certificate representing the shares subject thereto.

Fifth. The amount of capital with which the corporation will commence business is One Thousand Dollars ($1,000.00).

Sixth. The names and places of residence of the incorporators are as follows:

Names	Residences
C. S. Peabbles	Wilmington, Delaware
L. E. Gray	Wilmington, Delaware
L. H. Herman	Wilmington, Delaware

[fol. 89] Seventh. The corporation is to have perpetual existence.

Eighth. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Ninth. The property and business of this corporation shall be managed by its Board of Directors, not less than five and not more than thirty in number. They shall be elected by the stockholders at the annual meeting of the stockholders, and each director shall be elected for the term of one year, and until his successor shall be elected and shall qualify.

The directors shall have power from time to time, and at any time, when the stockholders, as such, are not assembled in a meeting, regular or special, to increase their own number to not more than thirty, and forthwith appoint and elect any other person, or persons, to be directors, to hold office until the next annual election, and their successors are elected and qualify.

In case of an increase in the Board of Directors between the annual elections by the stockholders, the newly created directorships shall be, and be construed as, vacancies until the next annual election to be filled forthwith by the Board.

Tenth. In furtherance, and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized:

To make and alter the By-laws of the corporation, except where and to the extent the By-laws themselves shall provide otherwise.

To authorize and cause to be executed mortgages and liens upon the real and personal property of the corporation.

To set apart out of any of the funds of the corporation available for dividends a reserve or reserves for any proper purpose, or to abolish any such reserve in the manner in which it was created.

By resolution or resolutions, passed by a majority of the whole board to designate one or more Committees, each committee to consist of five or more of the directors of the corporation, which, to the extent provided in said resolution or resolutions, or in the by-laws of the corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the corporation, and may have power to authorize the seal of the corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the by-laws of the corporation or as may be determined from time to time by resolution adopted by the Board of Directors.

When and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of a majority of the voting stock issued and outstanding, the Board of Directors shall have power and authority to sell, lease, or exchange all of the property and assets of the corporation, including its good will and its corporate franchises, upon such terms and conditions, and for such consideration, which may be in whole or in part shares of stock in, and/or other securities of, any other corporation or corporations, as its Board of Directors shall deem expedient and for the best interests of the corporation.

[fol. 90] The corporation may in its by-laws confer powers upon its Board of Directors in addition to the foregoing,

and in addition to the powers and authorities expressly conferred upon it by statute.

Eleventh. Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for this corporation under the provisions of Section 3883 of the Revised Code of 1915 of said State, or on the application of trustees in dissolution, or of any receiver or receivers appointed for this corporation under the provisions of Section 43 of the General Corporation Law of the State of Delaware, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three-fourths in value of the creditors, or class of creditors and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and said reorganization shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation.

Twelfth. Both stockholders and directors shall have power, if the by-laws so provide, to hold their meetings, and to have one or more offices within or without the State of Delaware, and to keep the books of this corporation (subject to the provisions of the statutes), outside of the State of Delaware at such places as may be from time to time designated by the Board of Directors.

Thirteenth. The corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

Fourteenth. No holder of any class of stock shall have the preemptive right to subscribe to, or to purchase, any additional stock of the corporation of any or all classes whether herein or hereafter authorized.

Fifteenth. The By-laws may provide for the division of the common shareholders into regional groups to be therein defined but not to exceed eight in number and for the election under such rules and regulations as may be prescribed by the By-laws of two Directors from nominees proposed by each such group.

(Attestation clause, signatures, seals and acknowledgment, being purely formal, are omitted.)

[fol. 91] By-laws Adopted by the Stockholders at Their First General Meeting and Subject to Change

Appalachian Coals, Incorporated

By-laws

Offices

1. The principal office shall be in the City of Wilmington, County of New Castle, State of Delaware, and the name of the resident agent in charge thereof is The Corporation Trust Company.

2. The corporation may also have an office in the City of Cincinnati, Ohio, and also offices at such other places as the Board of Directors may from time to time appoint, or the business of the corporation may require.

Seal

3. The corporate seal shall have inscribed thereon the name of the corporation, the year of its organization, and the words "Corporate Seal, Delaware." Said seal may be used by causing it or a facsimile thereof to be impressed or affixed, or reproduced, or otherwise.

Stockholders' Meetings

4. All meetings of the stockholders shall be held at the office of the corporation in Cincinnati, Ohio, unless the no-

tice of such meeting shall designate some other place, which may be done. The Board may also designate such other place or places as it may deem proper for the location of the office or offices of the corporation, at which stockholders' meetings may be held.

5. An annual meeting of the stockholders, after the year 1932, shall be held on the third Monday in February in each year, if not a legal holiday; and, if a legal holiday, then on the next secular day following, at 11:00 o'clock a. m., when they shall elect by a plurality vote, by ballot, as elsewhere herein provided, a Board of Directors, and transact such other business as may properly be brought before the meeting.

6. The holders of a majority of the stock issued and outstanding, and entitled to vote thereat, present in person, or represented by proxy, shall be requisite, and shall constitute a quorum at all meetings of the stockholders for the transaction of business, except as otherwise provided by law, by the certificate of incorporation or by these By-Laws. If, however, such majority shall not be present or represented at any meeting of the stockholders, the stockholders entitled to vote thereat, present in person or by proxy, shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until the requisite amount of voting stock shall be present. At such adjourned meeting, at which the requisite amount of voting stock shall be represented, any business may be transacted which might have been transacted at the meeting as originally notified.

[fol. 92] 7. At any meeting of the stockholders, every holder of common stock having the right to vote shall be entitled to vote in person, or by proxy appointed by an instrument in writing subscribed by such stockholder and bearing a date not more than three years prior to said meeting, unless said instrument provides for a longer period. Each stockholder shall have one vote for each share of stock having voting power, registered in his name on the books of the corporation, and except where the transfer books of the corporation shall have been closed or a date shall have been fixed as a record date for the determination of its stockholders entitled to vote, no share of stock shall be voted on at any election for directors which shall

have been transferred on the books of the corporation within twenty days next preceding such election of directors.

8. Written notice of the annual meeting shall be mailed to each stockholder entitled to vote thereat at such address as appears on the stock book of the corporation, at least ten days prior to the meeting.

9. A complete list of the stockholders entitled to vote at the ensuing election, arranged in alphabetical order, with the residence of each, and the number of voting shares held by each, shall be prepared by the secretary and filed in the office where the election is to be held, at least ten days before every election, and shall at all times, during the usual hours for business, and during the whole time of said election, be open to the examination of any stockholder.

10. Special meetings of the stockholders, for any purpose, or purposes, unless otherwise prescribed by statute, may be called by the President at any time; and shall be called by the President or Secretary at the request in writing of a majority of the Board of Directors, or at the request in writing of stockholders owning a majority in amount of the entire capital stock of the corporation issued and outstanding, and entitled to vote. Such request shall state the purpose or purposes of the proposed meeting.

11. Business transacted at all special meetings shall be confined to the objects stated in the call.

12. Written notice of a special meeting of stockholders, stating the time and place and object thereof, shall be mailed at least seven days before such meeting, to each stockholder entitled to vote thereat, at such address as appears on the books of the corporation.

Directors

13. The property and business of this corporation shall be managed by its Board of Directors, not less than five nor more than thirty in number. Until otherwise provided, there shall be 25 directors. They shall be elected by the holders of common stock at the annual meetings of the stockholders, in the manner herein specified, and each di-

rector shall be elected for the term of one year and until his successor shall be elected and shall qualify.

In order to promote the chief business of the corporation, that of dealing in coal, it is desirable to have all of the regions from which the corporation obtains coal represented on its Board of Directors. Therefore, the common stockholders of this Corporation are hereby divided into eight regional groups; namely, Kanawha, Logan, Williamson, Big Sandy-Elkhorn, Harlan, Hazard, Southwest Virginia, and Southern Appalachian; each group being composed of stockholders operating mines in the region bearing the name of that group. Each of the said groups shall have the right to submit to each annual meeting of the stockholders a list of nominees for Directors for the ensuing year and if such nominees be named, two Directors [fol. 93] shall be elected by the stockholders from each such list of nominees, but in the absence of such list of nominees from any group, the Directors who would otherwise have been chosen therefrom shall be nominated and elected by the stockholders at the meeting.

In addition to the sixteen Directors to be elected as aforesaid, the stockholders shall elect nine more Directors, making twenty-five in all.

The directors shall have power from time to time, and at any time, when the stockholders, as such, are not assembled in a meeting, regular or special, to increase their own number to not more than thirty, and forthwith appoint and elect any other person, or persons, to be directors, to hold office until the next annual election and until their successors are elected and qualify.

In case of an increase in the Board of Directors between the annual elections by the stockholders, the newly created directorships shall be, and be construed as, vacancies until the next annual election, to be filled forthwith by the Board.

If the incorporators shall elect less than twenty-five directors, then the number so elected may act as the Board of Directors, and a majority thereof shall constitute a quorum.

14. The directors may hold their meetings and have one or more offices, and keep the books of the corporation, except the original or duplicate stock ledger, outside of Delaware, at the office of the corporation in the City of

Cincinnati, Ohio, or at such other place or places as they may from time to time determine.

15. If the office of any director or directors becomes vacant by reason of death, resignation, retirement, disqualification, removal from office, or otherwise, the remaining directors, though less than a quorum, shall choose a successor or successors, who shall hold office until the next annual election and until a successor or successors have been duly elected, unless sooner displaced.

16. In addition to the powers and authorities by these By-Laws expressly conferred upon it, the Board of Directors may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation, or by these By-Laws, directed or required to be exercised or done by the stockholders.

Committees of Directors

17. The Board of Directors may, by resolution or resolutions passed by a majority of the whole Board, designate one or more committees, each committee to consist of five or more of the directors of the corporation, which, to the extent provided in said resolution or resolutions, shall have, and may exercise, the powers of the Board of Directors in the management of the business and affairs of the corporation, and may have power to authorize the seal of the corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be determined from time to time by resolution adopted by the Board of Directors.

18. The committees shall keep regular minutes of their proceedings and report the same to the Board when required.

Compensation of Directors

19. Directors, as such, shall not be paid anything for services or for expenses; provided that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

[fol. 94] Meetings of the Board

20. The newly elected Board may meet at such place and time, either within or without the State of Delaware, as shall be fixed by the vote of the stockholders at the annual meeting, for the purpose of organization or otherwise, and no notice of such meeting shall be necessary to the newly elected directors in order legally to constitute the meeting; provided a majority of the whole Board shall be present; or they may meet at such place and time as shall be fixed by the consent in writing of all the Directors.

21. Regular meetings of the Board shall be held once in each month, and may be held without notice at such time and place, either within or without the State of Delaware, as shall from time to time be determined by the Board.

22. Special meetings of the Board may be called by the President on three days' notice to each director, either personally or by mail, or by telegram. Special meetings shall be called by the President or Secretary in like manner and on like notice, on the written request of two directors.

23. At all meetings of the Board, one third of the directors shall be necessary and sufficient to constitute a quorum for the transaction of business, and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board of Directors, except as may be otherwise specifically provided by statute or by the certificate of incorporation or by these By-Laws.

Officers

24. The officers of the corporation shall be chosen by the directors, and shall be a President, Vice President, Secretary, Treasurer and Chairman of the Board; the Chairman may or may not be a member of the Board. The Board of Directors may also choose additional Vice Presidents, Assistant Secretaries, and Assistant Treasurers. The Secretary and Treasurer may be the same person, and any Vice President may hold at the same time the office of Secretary or Treasurer.

25. The Board of Directors, at its first meeting after each annual meeting of stockholders, shall choose a Presi-

dent and Vice President from their own number, and a Chairman, a Secretary and a Treasurer who need not be members of the Board.

26. The Board may appoint such officers and agents as it shall deem necessary, who shall hold their offices for such terms, and shall exercise such powers and perform such duties, as shall be determined from time to time by the Board.

27. The salaries of all officers and agents of the Corporation shall be fixed by the Board of Directors, except that the Chairman of the Board shall serve without remuneration.

28. Any officer elected or appointed by the Board of Directors may be removed at any time by the affirmative vote of a majority of the whole Board of Directors. If the office of any officer or officers becomes vacant, for any reason, the vacancy shall be filled by the affirmative vote of a majority of the whole Board of Directors.

[fol. 95] The President

29. The President shall be the chief executive officer of the Corporation; he shall have general and active management of the business of the corporation, and shall see that all orders and resolutions of the Board are carried into effect.

30. He shall execute bonds, mortgages and other contracts requiring a seal, under the seal of the corporation.

31. He shall be ex-officio a member of all standing committees, and shall have the general powers and duties of supervision and management usually vested in the office of President of a corporation.

Chairman of the Board

32. The Chairman of the Board shall preside at all meetings of the stockholders and directors, and shall have the general powers and duties usually vested in the Chairman of the Board of Directors of a corporation.

Vice-Presidents

33. The Vice Presidents, in order of their seniority, shall, in the absence or disability of the President, perform the duties and exercise the powers of the President, and shall perform such other duties as the Board of Directors shall prescribe.

The Secretary and Assistant Secretaries

34. The Secretary shall attend all sessions of the Board and all meetings of the stockholders, and record all votes, and the minutes of all proceedings in a book to be kept for that purpose; and shall perform like duties for the standing committees when required. He shall give, or cause to be given, notice of all meetings of the stockholders and of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors or President, under whose supervision he shall be. He shall keep in safe custody the seal of the corporation, and when authorized by the Board affix the same to any instrument requiring it, and when so affixed it shall be attested by his signature or by the signature of the Treasurer or an Assistant Secretary.

35. The Assistant Secretaries, in the order of their seniority, shall, in the absence or disability of the Secretary, perform the duties and exercise the powers of the Secretary, and shall perform such other duties as the Board of Directors shall prescribe.

The Treasurer and Assistant Treasurers

36. The Treasurer shall have the custody of the corporate funds and securities, and shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation, and shall deposit all moneys and other valuable effects in the name and to the credit of the corporation, in such depositories as may be designated by the Board of Directors.

37. He shall disburse the funds of the corporation as may be ordered by the Board, taking proper vouchers for such disbursements, and shall render to the President and

[fol. 96] Directors, at the regular meetings of the Board, or whenever they may require it, an account of all his transactions as Treasurer and of the financial condition of the corporation.

38. He shall give the corporation a bond, if required by the Board of Directors, in a sum, and with one or more sureties, satisfactory to the Board, for the faithful performance of the duties of his office, and for the restoration to the corporation, in case of his death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property, of whatever kind, in his possession or under his control, belonging to the corporation.

39. The Assistant Treasurers, in the order of their seniority, shall, in the absence or disability of the Treasurer, perform the duties and exercise the powers of the Treasurer, and shall perform such other duties as the Board of Directors shall prescribe.

Duties of Officers May Be Delegated

40. In case of the absence of any officer of the corporation, or for any other reason that the Board may deem sufficient, the Board may delegate, for the time being, the powers or duties, or any of them, of such officer to any other officer, or to any Director, provided a majority of the entire Board concurs therein.

Certificates of Stock

41. The certificates of stock, for both common and preferred stock, shall be numbered separately, and shall be entered in the books of the corporation as they are issued. They shall exhibit the holder's name, and number of shares, and the kind of stock, whether common or preferred, together with all the specific provisions and conditions under which it is issued, prescribed by the statutes, by the charter, by the by-laws, and/or resolutions of the Board of Directors, and shall be signed by the President, or a Vice President, and the Treasurer or an Assistant-Treasurer, or the Secretary or an Assistant Secretary. If the corporation has a transfer agent or an assistant transfer agent, or a transfer clerk, acting on its behalf, and a registrar, the signature of any such officer may be facsimile.

Option to Repurchase Common Stock

42. In selling, disposing of, or issuing common stock of the corporation, the Board of Directors shall reserve to the corporation the option to repurchase the same upon the happening of any one of the following contingencies at the book value of said stock as shown by the balance sheet of the corporation last preceding the exercise of the option: (a) if the corporation shall cease to be the exclusive selling agent of the holder of such stock for all coal produced by the holder in any of the regions mentioned in section 13 hereof, or (b) if he shall cease to produce coal, or (c) shall violate any present or future contract which he may have with the corporation, or (d) if title to the shares of the holder, or any of them, shall, either voluntarily or involuntarily, pass to another. Such option may be accepted by the corporation as to all or any number of the shares subject thereto at any time after any such event but not later than thirty days after the certificate or certificates for such shares are presented to the corporation for transfer, nor in any event later than twenty years from the date of the original issuance of the shares subject thereto, by mailing a written acceptance to the holder at his address as shown on the books of the corporation.

If the exercise of such option or options by the corporation would operate to impair its capital, the corporation may assign the the option or options to any other record [fol. 97] holder or holders of common stock selected by the Board of Directors. Options so reserved by the corporation shall be printed on the face or reverse of the certificate representing the shares subject thereto.

No share of common stock shall be transferred on the books of the corporation to the name of any other person whether outright or as pledgee so long as such option remains in force or contrary to the provisions hereof.

Transfers of Stock

43. Transfers of stock shall be made on the books of the corporation only by the person named in the certificate, or by attorney, lawfully constituted in writing, and upon surrender of the certificate therefor.

Closing of Transfer Books

44. The Board of Directors shall have power to close the stock transfer books of the corporation for a period

not exceeding forty days preceding the date of any meeting of stockholders, or the date for payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion, or exchange of capital stock shall go into effect; provided, however, that in lieu of closing the stock transfer books as aforesaid, the Board of Directors may fix in advance a date, not exceeding forty days preceding the date of any meeting of stockholders or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of, and to vote at, any such meeting, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock, and in such case such stockholders, and only such stockholders as shall be stockholders of record on the date so fixed, shall be entitled to such notice of, and to vote at, such meeting, or to receive payment of such dividends, or to receive such allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any stock on the books of the corporation after any such record date fixed as aforesaid.

Registered Stockholders

45. The corporation shall be entitled to treat the holder of record of any share or shares of stock as the holder in fact thereof, and, accordingly, shall not be bound to recognize any equitable or other claim to, or interest in, such share on the part of any other person, whether or not it shall have express or other notice thereof, save as expressly provided by the laws of Delaware.

Lost Certificate

46. Any person claiming a certificate of stock to be lost or destroyed shall make an affidavit or affirmation of that fact, and advertise the same in such manner as the Board of Directors may require, and the Board of Directors may, in its discretion, require the owner of the lost or destroyed certificate, or his legal representative, to give the corporation a bond, in such sum as it may direct not exceeding

double the value of the stock, to indemnify the corporation against any claim that may be made against it on account of the alleged loss of any such certificate. A new certificate of the same tenor and for the same number of shares [fol. 98] as the one alleged to be lost or destroyed may be issued without requiring any bond when, in the judgment of the Directors, it is proper so to do.

Waiver of Holders of Common Stock of the Right to Purchase and Have Additional Stock

47. In case of future increase in the number of shares of stock, or in case of the issuance of any shares of stock of any class now authorized by the certificate of incorporation but not already subscribed for or sold, the holders of both common and preferred stock at that time waive their right to participate in such increase or such issuance, and the same may be sold as the Board of Directors may deem proper.

Checks

48. All checks or demands for money and notes of the corporation shall be signed by such officer or officers, or such other person or persons, as the Board of Directors may from time to time designate.

Fiscal Year

49. The fiscal year shall begin the first day of January in each year.

Dividends

50. Dividends upon the capital stock of the corporation subject to the provisions of the certificate of incorporation, if any, may be declared by the Board of Directors at any regular or special meeting, pursuant to law. Dividends may be paid in cash, in property, or in shares of the capital stock.

51. Before payment of any dividend, there may be set aside out of any funds of the corporation available for dividends, such sum or sums as the Directors from time to time, in their absolute discretion, think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining any property of the corporation, or for such other purpose as the Directors shall

think conducive to the interests of the corporation, and the Directors may abolish any such reserve in the manner in which it was created.

Directors' Annual Statement

52. The Board of Directors shall present at each annual meeting, and when called for by vote of the stockholders at any special meeting of the stockholders, a full and clear statement of the business and condition of the corporation.

Notices

53. Whenever under the provisions of these by-laws notice is required to be given to any Director, officer or stockholder, it shall not be construed to mean personal notice, but such notice may be given in writing, by mail, by depositing the same in the Post Office or letter box, in a postpaid sealed wrapper, addressed to such stockholder, officer or director, at such address as appears on the books of the corporation, or, in default of other address, to such [fol. 99] director, officer, or stockholder at the General Post Office in the City of Wilmington, Delaware, and such notice shall be deemed to be given at the time when the same shall be thus mailed.

54. Any stockholder, director, or officer may waive any notice required to be given under these By-Laws.

Amendments

55. These By-Laws may be altered or amended, or repealed, by the affirmative vote of a majority of the stock issued and outstanding, and entitled to vote thereat, at any regular or special meeting of the stockholders, if notice of the proposed alteration or amendment or repeal be contained in the notice of the meeting, or by the affirmative vote of a majority of the Board of Directors, at any regular or special meeting of the Board, if notice of the proposed alteration or amendment be contained in the notice of the meeting; provided, however, that no change of the time or place for the election of directors shall be made within sixty days next before the day on which such election is to be held, and that in case of any change of such time or place, notice thereof shall be given to each stockholder in

person or by letter mailed to his last known Post Office address at least twenty days before the election is held; and provided further that the Board shall not have power to amend or alter sections 1-3-6-7-8-9-10-11-12-13-16-18-24-25-29-30-31-32-33-41-42-43-45-46-47-52-53-54 and 55 of these By-Laws.

[fol. 100] (As Finally Revised at Meeting of Operators at Cincinnati, Ohio, December 30, 1931)

Contract Form to be Entered Into Between Appalachian Coals, Incorporated, and Individual Coal Producers

Agreement, made this — day of ——, 1932, by and between —— ——, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Producer," and Appalachian Coals, Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter called the "Selling Agent."

Witnesseth: Whereas, the Producer is the owner and/or lessee of certain coal mines located at —— and ——, in the States of —— and ——, and is engaged in the mining and production of coal; and

Whereas, the Selling Agent is entering into the business of buying and selling coal and of selling and distributing coal on a commission basis for various producers operating in southwest Virginia, southern West Virginia, eastern Kentucky and northeast Tennessee, in the producing territory generally known as the Appalachian region, and is prepared to sell and distribute coal of the kind and character produced by the Producer on a commission basis; and

Whereas, this Agreement is one of a number of identical or substantially similar agreements between other coal producers operating in said Appalachian region and the Selling Agent;

Now, therefore, for and in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto hereby covenant and agree as follows:

First. As a matter of information to the Selling Agent with respect to the ability of the Producer to produce coal, the Producer represents that during the calendar years 1923

to 1931, inclusive, the average annual production and sale of coal of the Producer was —— tons; and that, in the normal course of business, the Producer's mines are of sufficient capacity to maintain the present rate of production during a period of —— years. A list of the Producer's mines is attached hereto, marked "Exhibit A," showing the date each was developed, and average annual production during the life thereof, the present rated capacity, and the remaining recoverable tonnage in the land owned or leased by the Producer adjacent and available to same.

Second. The Producer hereby appoints the Selling Agent as its exclusive agent for the sale of the coal produced by it in its mines located at —— and ——, in the states of —— [fol. 101] and ——, and the Selling Agent hereby accepts the appointment as such selling agent, all on the terms and conditions hereinafter contained; provided, however, that the Producer hereby expressly reserves from the terms of this agreement such coal as may be produced and used by it in the operation of its mines or which it may furnish or sell to its employees for their use, or which remains to be delivered on contracts now in force and not yet completed at the date of the taking effect of this agreement, a list of which contracts, with informative data, is attached hereto and marked "Exhibit B."

Third. The parties hereto agree that, as soon as may be after the taking effect of this agreement, the Selling Agent will establish a standard classification for all coal which it sells as agent, based upon the suitability of the coal for particular purposes, such as domestic coals, gas coals, by-product coals, metallurgical coals and steam coals, and such other classifications as may be decided upon by Selling Agent. These classifications shall give regard to chemical analysis, including (a) moisture, (b) volatile matter, (c) fixed carbon, (d) ash, (e) sulphur, (f) British Thermal Units, (g) fusion point of ash, and (h) structure and physical characteristics. The Selling Agent will also establish a standard classification of sizes for the various grades from the mines of each producer whose coal it sells.

The Selling Agent shall promptly give to the Producer written notice of the standard of classifications established by the Selling Agent and of the classes in which the Selling Agent has placed the coal of the Producer and if, within

twenty days from the receipt of such notice, the Producer shall not make any objection thereto, the classification of the coal of the Producer so established shall be final and binding on the Producer until a different classification of the coal of the Producer has been made by the Selling Agent. In the event that, within such period of twenty days, the Producer shall give written notice to the Selling Agent that it objects to such classification of its coal, and specifies its objections, the Producer shall have the right to have a reclassification made of its coal, and in the event that the parties can not agree upon such reclassification, the differences between them shall be settled and determined under the provisions of paragraph "Fourteenth" hereof.

Pending the establishment and classification of grades of coal as above provided, the Selling Agent shall classify such coals as nearly as possible in accordance with the classification furnished by the Producer; and to this end the Producer shall furnish the Selling Agent with a statement for the years 1930 and 1931 showing as far as practicable the uses for which its coal was sold during those years, the chemical analysis of the coal from each mine, and for each grade of coal from each mine, the description and sizes of the screens used at each mine, the number of tracks available, and showing the number of grades that can be made at one time and the percentage that each grade bears to the total mine run coal produced.

Fourth. It is further understood and agreed by and between the parties hereto that the Selling Agent will use its best efforts to sell all the coal produced by the Producer at the best possible prices obtainable, and that it is likewise obligated to sell all the coal produced by other producers whose coal it sells, at the best possible prices obtainable, or so much thereof, as the market will justify; but it is further understood and agreed that the demand for coal of different grades, uses and classifications varies materially from season to season and from time to time, depending upon the industrial market and weather conditions, and that at times there is a greater demand for coal suitable for certain purposes than at other times, and, therefore, the Selling Agent will be able at times to sell particular classes of coal in greater quantities than it may be able to sell other classes of coal. When the demand is not sufficient to absorb

[fol. 102] the output of all producers represented by the Selling Agent, the participation as between the various producers, as nearly as may be, shall be as follows:

In the event the demand at the time this contract becomes effective is not sufficient to operate the mines of all producers represented by the Selling Agent upon a full time basis, then the participation of the Producer in the total sales of the Selling Agent for the first calendar month after this contract goes into effect, shall be such percentage of the total sales made by the Selling Agent for that month that the total car allotment of the Producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the Selling Agent, for the same period; and thereafter the monthly participation of the Producer in the total monthly sales made by the Selling Agent shall be a percentage equal to the percentage the Producer's car allotment for the second preceding calendar month bears to the total car allotment of all the producers whose coal is sold by the Selling Agent for the second preceding calendar month; it being understood, however, that these percentages are subject to variation due to variations in the sale of the different sizes, grades and qualities of coals, as above set out; but that it is the purpose of this and all similar agreements that the Selling Agent will, over each annual period, as nearly as conditions will permit, all factors considered, give each producer's mine or mines producing the same or interchangeabe grades of coal as nearly its pro rata part of available orders as is reasonably possible. All coal shipped by the Producer under contracts shown in "Exhibit B," filed herewith, shall be counted against the Producer's proportionate tonnage of coal sold by the Selling Agent, as determined in this paragraph.

Fifth. The Selling Agent agrees that, subject to the terms of this agreement, in so far as possible, it will sell the coal of the Producer in the markets to the same customers and under the mine name or trade name or names that the Producer has heretofore sold such coal, and shall maintain the trade names and good will of the Producer, and shall endeavor to broaden the market.

Sixth. During the term of this Agreement the Selling Agent is hereby authorized by the Producer to sell the coal

of the Producer, subject to the conditions hereinafter stated, at the best price or prices obtainable under existing competitive conditions and with due regard to the quality, preparation and classification of the coal to be sold; provided, however, that the Selling Agent shall make no contracts of sale, or sales, calling for future deliveries of coal from the mines of the Producer after sixty days from the date of such contract or sales, without first obtaining the written authorization of the Producer thereto.

Seventh. Subject to the provisions of this Agreement, the Producer agrees promptly to fill all orders taken by the Selling Agent hereunder; to prepare all coal to be shipped by the Producer under this Agreement in accordance with good practice; to screen all such coal as directed by the Selling Agent and as the screening equipment of the Producer will permit; and to ship all such coal in the kind of equipment indicated by the Selling Agent; provided, however, that the Producer shall not be liable for failure to make shipments due to strikes, lockouts, car shortages or any other cause beyond its control. The Selling Agent shall have the right to inspect at the tipple all the coal of the Producer to be shipped pursuant to contracts of sale made by the Selling Agent, and, subject to the conditions herein contained, to determine all questions of classification, grade, preparation, and quality with respect to such coal.

Eighth. The Selling Agent shall have authority to make allowances and adjustments with purchasers on account of any complaint of any purchaser resulting from causes within the control of the Producer and shall deduct the amount of such allowances and adjustments from the sale [fol. 103] price of the coal before the commission of the Selling Agent is computed and the amount to be paid the Producer is determined; provided, however, that in all such cases the Producer shall first be given an opportunity to investigate any such claims and make its representations to the Selling Agent in regard thereto. The Selling Agent shall bear the cost of any allowances or adjustments with the Producer on account of any complaint of any purchaser resulting from causes within the control of the Selling Agent.

Ninth. The Producer agrees to pay to the Selling Agent a commission of ten per cent of the gross selling price f. o. b. at the mines, on coal shipped in accordance with the terms of this agreement; and the Selling Agent shall deduct the said commission from the proceeds of all sales before making payment to the Producer, as in paragraph "Tenth" provided.

Tenth. All coal sold hereunder shall be paid for and settlements made on the basis of weights furnished by the Producer, which weights shall be railroad scale weights at scale nearest to the point of origin. On or before the 20th day of each calendar month during the term hereof the Selling Agent shall account and pay to the Producer the full actual purchase price of all coal of the Producer shipped by the Selling Agent under this Agreement for which payment to the Producer has not theretofore been made and on which railroad weights have been received by the Selling Agent prior to the 10th day of that month for coal shipped prior to the first day of the month, less any and all commissions and/or deductions authorized under this Agreement, unless in particular case different dates for payment be agreed upon by the parties.

Eleventh. Any sales made directly by the Selling Agent for the account of the Producer shall be invoiced to the purchaser in the name of the Selling Agent and payment shall be made to the Selling Agent by the purchaser. A copy of each such invoice shall be sent to the Producer at the time it is sent to the purchaser.

It is understood and agreed between the parties hereto that all contracts for delivery of coal extending over a period of sixty days from the effective date thereof, shall be signed by the purchaser, the Sub-agent hereinafter provided for, if any, the Selling Agent, and the Producer; and that the Producer shall either sign and return the said contract within five days after the receipt of same from the Selling Agent, or within such less time as the Selling Agent notifies the Producer the Selling Agent must accept the same and notify the purchaser; and that the rejection of any contract may necessarily result in the restriction of the pro rata share of the business on such grade of coal as is available for distribution by the Selling Agent.

It is understood and agreed that each Producer will designate to the Selling Agent two or more persons with whom it may keep in close contact by mail, wire or telephone to ascertain the views of the Producer in regard to contracts being negotiated by the Selling Agent, and that the Producer will accept any contracts negotiated under its authority given by personal conferences or in communication by telephone, telegraph or mail.

Twelfth. The books and records of the parties hereto, so far as they have to do with the subject of this Agreement, shall, at all reasonable times, be open to the inspection of the other party; and the Selling Agent is hereby expressly authorized to call upon any Railway Company over whose lines shipments have been made by the Producer for any and all information pertaining to any such shipments.

Thirteenth. Not later than the 25th day of each calendar month the Selling Agent shall furnish to the Producer a complete report of all coal shipped for the account of the [fol. 104] Producer and the total of all coal shipped for the account of other producers who shall have entered into identical or substantially similar agreements with the Selling Agent, showing for the preceding month the classes, quantities and grades of coal shipped and the average prices received for each.

Fourteenth. In the event that any controversy shall arise at any time between the parties hereto with respect to any matter or question arising under or by virtue of this agreement, which they are unable to adjust or settle, the controversy shall be referred for settlement to a board of arbitration composed of three disinterested and competent persons versed in the coal trade, one of whom shall be chosen by the Producer, one by the Selling Agent, and the third by the two so selected, and its findings and decision shall be binding upon both parties. The provisions of this Agreement relating to arbitration shall be governed by and construed in accordance with The United States Arbitration Act and all amendments thereto.

Fifteenth. The Producer may at any time designate any person, firm, or corporation to act as a Sub-agent of the

Selling Agent, to sell the coal of the Producer, and said Sub-agent may sell other coal which the Selling Agent has for sale, unless the Producer specifically limits the Sub-agent to the selling of coal produced by it, subject to all the terms and conditions of this Agreement and on the terms and conditions contained in the form of Sub-agent's agreement annexed hereto and marked "Exhibit C," upon furnishing to the Selling Agent satisfactory proof that the Sub-agent is financially responsible and able to meet the obligations to be assumed by it. Producer reserves the right to cancel any sub-agency designation at any time he shall become dissatisfied with the credit standing of the Sub-agent, by giving written notice of such cancellation to the Sub-agent and to Selling Agent, and to require customers to whom coal has been sold through such Sub-agent to remit the gross unpaid selling prices thereof direct to the Selling Agent. Producer also reserves the right to withdraw or cancel any such sub-agency designation for any reason appearing sufficient to Producer, upon giving to the Sub-agent and to Selling Agent thirty (30) days written notice of such withdrawal, and the like right to require customers to whom coal has been sold to remit direct to the Selling Agent after the termination of the sub-agency. After any such withdrawal the Selling Agent shall pay to the Sub-agent all commissions earned by him under his sub-agency agreement during the existence thereof when and as collections are made by Selling Agent.

In case such Sub-agent makes sales contracts for coal during periods of market shortages, under the conditions set out in paragraph "Fourth" hereof, in excess of the pro rata share of the Producer in the total sales of the Selling Agent, the Selling Agent shall have the right to offer to other producers of like character of coal the said excess tonnage, and the Sub-agent shall be entitled to its commissions on said excess from the Producer accepting the orders therefor.

The Selling Agent shall be responsible for the acts of its sub-agents in the same manner as it is responsible for its own acts, except as hereinafter provided.

Sixteenth. The Selling Agent guarantees payment of all accounts and is hereby granted full authority to collect for all coal sold by it under this Agreement, and, for the

purpose of enforcing such collection, to bring suit therefor in its own name; provided, however, that the Selling Agent shall not be liable to the Producer for the acts, omission, or failure of any Sub-agent designated by the Producer, and the Producer warrants and guarantees the financial responsibility of the Sub-agent and hereby assumes entire responsibility therefor, in so far as its own coal sold through the Sub-agent is concerned, as between it and Selling Agent, until it has cancelled its designation of said Sub-agent, in the manner hereinbefore provided, and Selling Agent shall not be liable to Producer for, or on account of, any of Producer's coal sold through the Sub-agent.

[fol. 105] Seventeenth. It is the intent of this Agreement to provide for an orderly and business-like method of selling the coal of the Producer by the Selling Agent hereinbefore appointed the Producer's exclusive selling agent, and it is therefore agreed that the Producer shall not dispose of, sell, or ship any coal except upon the order and at the direction of the Selling Agent, or as provided in paragraph "Second" hereof, and in the event the Producer shall, in violation of the terms of this Agreement sell, or ship or fail or refuse to ship, coal as directed by the Selling Agent, the Selling Agent shall have the right and is hereby authorized, to purchase other coal to fill any contract which it may have made for the sale of Producer's coal, and charge the Producer with the difference between the price at which the Producer's coal was sold under such contract and the price which the Selling Agent is compelled to pay for the coal so purchased by it, plus the Selling Agent's commission of ten per cent; and the Producer hereby agrees that such amount may be taken from any moneys due to it by the Selling Agent, and that if no such moneys are due, it will pay the said amount as liquidated damages, upon demand by the Selling Agent.

Eighteenth. This Agreement shall become effective and binding upon the parties when same shall be executed by them. Producer's coal shall be turned over to Selling Agent for sale, under the terms hereof, not sooner than Feb. 15, 1932, nor later than April 1st, 1932, or at such intervening day as Selling Agent shall, by notice to the Producer, specify. This agreement shall continue in force

until April 1, 1935, and after such date shall continue for periods from year to year unless and until either party hereto shall elect to terminate this Agreement by giving to the other party six months' notice thereof. Upon receipt of such notices the Selling Agent shall promptly notify all producers with whom it has entered into substantially identical or similar agency agreements, and within ten days from the receipt by the producers of any such notices the producers may serve notice of termination to take effect on the same date.

Nineteenth. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, provided that in case the Producer sells its property to a purchaser who will not sell the coal produced thereon in the commercial market, or the Producer abandons the operation of its mine or mines, this contract shall be thereby terminated, except as to the performance of contracts then in force for the delivery of coal.

In witness whereof, the respective parties hereto have caused this Agreement to be executed by their proper officers thereunto duly authorized, the day and year first above written, in duplicate originals.

—— ——, by —— ——, Its ——. —— ——, by —— ——, Its ——.

[fol. 106] EXHIBIT "A"

List of mines of —— Company, called "Producer" in a certain contract between it and Appalachian Coals, Incorporated, dated the — day of —, 1932, showing the date each was developed, annual average production during the life thereof, the present rated capacity, and the remaining recoverable tonnage in the land owned and/or leased by it, adjacent and available to same, filed with and attached to said contract as a part thereof, marked "Exhibit A".

Name of Mine: ——.
Date Developed: ——.
Average Annual Production: ——.
Present Rated Capacity: ——.
Remaining Recoverable Tonnage: ——.

(Repeat as to each separate mine.)

[fol. 107] EXHIBIT "B"

A list of contracts, with informative data, now in force and not yet completed, binding upon —— Company, showing the coal which remains to be delivered under the provisions of each, filed with and attached to a part of a contract between said company and Appalachian Coals, Incorporated, marked "Exhibit B".

Contract No. 1.

Date of Contract: ——.
Date of Expiration: ——.
Total Undelivered Tonnage: ——.
Kind or Class of Coal: ——.
Rate of Delivery: ——.

Contract No. 2, etc.

(Repeat as above under No. 1.)

[fol. 108] EXHIBIT "C"

Contract Form to be Entered into Between Appalachian Coals, Incorporated, and its Subagents

Agreement, made this — day of ——, 193–, between Appalachian Coals, Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter called the "Selling Agent," and ——, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Sub-agent," witnesseth:

Whereas, pursuant to an Agreement dated the — day of ——, 193–, by and between the Selling Agent and —— ——, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Producer," a copy of which Agreement is hereto attached and made a part hereof, the Selling Agent has agreed to act as the exclusive selling agent of the Producer for the sale of coal produced by it in its mines located in the States of —— and ——, in the Counties of ——.

Whereas, it is provided in said Agreement that the Producer may at any time designate a sub-agent of the Selling

Agent subject to all the terms and conditions of the agreement; and

Whereas, the Producer has designated —— —— as its sub-agent for a period of one (1) year pursuant to the terms and conditions of said agreement; and

Whereas, the Sub-agent is engaged in the sale and distribution of coal and is willing to act as Sub-agent of the Selling Agent on the terms and conditions hereinafter contained,

Now, therefore, in consideration of the premises and of the mutual covenants hereinafter contained, the parties hereto covenant and agree as follows:

First. The Selling Agent hereby appoints the Sub-agent as its sub-agent for the sale of the coal of the Producer and such other coal of other producers as the Selling Agent and the Sub-agent may agree upon from time to time, and the Sub-agent hereby accepts such appointment on all the terms and conditions contained in this Agreement.

Second. The Sub-agent agrees to use its best efforts to sell such coal as it is authorized to sell hereunder in such amounts and in accordance with such classifications as the Selling Agent may designate and upon such terms and conditions and at the price or prices established by the Selling Agent from time to time; and the Sub-agent shall not depart from the amounts, classifications, terms and conditions and prices so established by the Selling Agent without the prior authorization of the Selling Agent.

Third. The Sub-agent shall not have authority to make allowances and adjustments on account of any complaint of any purchaser resulting from causes within the control of the Producer or the Selling Agent, except under the direction and subject to the approval of the Selling Agent. Any such allowance and adjustment so approved by the Selling Agent shall be deducted from the amount to be remitted by the Sub-agent to the Selling Agent in accordance with the terms of this Agreement.

Fourth. The Sub-agent shall have authority to make allowances and adjustments with purchasers on account of any complaint of any purchaser resulting from causes within the control of the Sub-agent and the amount of any commission due to the Sub-agent from the Selling Agent under the provisions of paragraph "Sixth" of this Agreement shall

be reduced by the amount of any such allowance and adjust-
[fol. 109] ment, and the Sub-agent further agrees to hold the Selling Agent harmless from any damage or liability occasioned by any act or omission of the Sub-agent; provided, however, that anything herein contained to the contrary notwithstanding, the Sub-agent shall in no wise be responsible for any loss or damage occasioned by any act or omission on the part of the Selling Agent or the Producer in respect of any coal sold in accordance with the provisions of this Agreement.

Fifth. The Sub-agent guarantees the payment of all accounts and shall collect all sums due and owing to it for the account of the Selling Agent for all coal sold by the Sub-agent under this Agreement, and, for the purpose of enforcing such collection, full and complete authority is hereby granted to the Sub-agent to bring suit therefor in its own name.

Sixth. The Selling Agent agrees to pay to the Sub-agent a commission of eight (8%) per cent of the selling price, f. o. b. at the mines, on coal shipped pursuant to the terms of this Agreement and the Sub-agent is hereby authorized to deduct this commission before making the payment to the Selling Agent as in Paragraph "Seventh" provided.

Seventh. On or before the 20th day of each calendar month, the Sub-agent shall account and pay to the Selling Agent the full purchase price of all coal shipped by the Sub-agent under this Agreement for the account of the Selling Agent, for which payment has not theretofore been made by it and on which railroad weights have been received by the Sub-agent prior to the 10th day of that month for all coal shipped prior to the first day of the month, less any and all commissions and/or deductions authorized under this Agreement, unless in particular cases different dates for payment be agreed upon by the parties.

Eighth. All sales shall be made by the Sub-agent for the account of the Selling Agent, but shall be invoiced to the purchaser in the name of the Sub-agent, as agent for the Selling Agent, and payment shall be made to the Sub-agent by the purchaser. A copy of each such invoice shall be sent to the Selling Agent and the Producer or Producers at the time it is sent to the purchaser.

Ninth. In the event that any controversy shall arise at any time between the parties hereto with respect to any matter or question arising under or by virtue of this Agreement, which they are unable to adjust or settle, the controversy shall be referred for settlement to a board of arbitration composed of three disinterested and competent persons experienced in the coal trade, one of whom shall be chosen by the Selling Agent, one by the Sub-agent, and the third by the two so selected, and their findings and decision shall be binding upon both parties. The provisions of this Agreement, relating to arbitration, shall be governed by and construed in accordance with The United States Arbitration Act and all amendments thereto.

Tenth. This Agreement shall continue in force for a period of one year from the date hereof and at the expiration of such period shall continue thereafter for periods from year to year, unless and until either party hereto shall elect to terminate this Agreement by giving the other party three months' written notice thereof; provided, however, that anything herein contained to the contrary notwithstanding, this Agreement shall cease and determine upon the termination for any reason of the Agreement made the — day of ——, 193-, by and between the Producer and the Selling Agent, or upon cancellation by Producer of its designation of Subagent, as provided in said Agreement last mentioned, and in the event of such cancellation the rights of the parties hereto shall be determined by the provisions of said last mentioned contract.

In witness whereof the respective parties hereto have this day caused this Agreement to be executed by their proper officers thereunto duly authorized, the day and year first above written, in duplicate originals.

—— ——, by —— ——, Selling Agent. —— ——, by —— ——, Subagent.

Approved.

—— ——, by —— ——, Producer.

[fol. 110] Subscription Agreement

To Appalachian Coals, Incorporated:

Whereas, Appalachian Coals, Incorporated, hereinafter called Selling Agent, has been organized under the laws of Delaware for the purpose, among others, of acting as selling

agent for producers of coal in the southern high volatile region, with an authorized capital stock of 1,000 shares of common stock of the par value of $1.00 each, and 9,000 shares of 7% non-voting cumulative preferred stock of the par value of $100.00 each, redeemable at par and accrued and unpaid dividends; such preferred stock to have such other rights and privileges and to be subject to such restrictions as may be prescribed by the Board of Directors, and are not in conflict with the provisions of paragraph fourth of the charter of Selling Agent or in derogation of the right of common stock as provided in said charter; and stock in the Selling Agent, until otherwise provided by the Board, is to be sold to producers of coal on the following basis:

One (1) share of common stock for each producer and in addition thereto one (1) share for each 100,000 net tons, or major fraction thereof, in excess of 100,000 tons produced by him in 1931; and where the producer will not appoint any sub-agent of Selling Agent for the sale of his coal, one (1) share of preferred for each 66-2/3 net tons or major fraction thereof of his average monthly production during the year 1931, and where producer will appoint a sub-agent for the sale of his coal, one (1) share for each 666-2/3 net tons or major fraction thereof of his average monthly production during the year 1931; and

Whereas, undersigned producer, herein called Producer, desires to subscribe for stock of Selling Agent on such plan, and as a basis thereof, represents that he in 1931 produced from his mines at ——, in the state of ——, — net tons of coal, and that he will/will not appoint a sub-agent for the sale of his coal to be handled by Selling Agent:

It is agreed:

1. Producer hereby subscribed and agrees to pay for stock in Selling Agent, as follows:

— shares of common @ $1.00 per share..... $....
— shares of preferred @ $100.00 per share..... ....

2. The price of the common stock and 25% of the price of the preferred stock, herein subscribed for, shall be paid to Selling Agent immediately upon acceptance by it of this subscription. The balance of the price of the preferred stock shall be payable in three equal installments, when and where

same shall be called by the Board of Directors of Selling Agent, but in no event shall installments be called for payment at less than thirty day intervals.

3. Certificates for preferred stock will not be issued until paid for in full.

4. Common stock shall be subject to the option of Selling Agent to repurchase same, as provided in the By-Laws of Selling Agent, and Producer hereby grants such option to Selling Agent on all and every part of such shares herein subscribed for.

5. This subscription contract shall not be binding upon Producer unless and until the same is countersigned at the place indicated herein by any one of the following persons, each of whom is hereby authorized to countersign the same for and on behalf of the Producer:

——— ———,
——— ———,
——— ———,

[fol. 111] and is accepted by Selling Agent, but when so countersigned and accepted, shall be binding on Producer:

6. Producer, if a corporation, represents that its officers are duly authorized to execute this agreement in its behalf, and that it has the necessary corporate authority to subscribe for and hold the stock of Selling Agent.

Dated at ———, this — day of January, 1932.

——— ———, Producer, by ——— ———, Its ———.

Countersigned on behalf of Producer this — day of January, 1932.

By ———.

Accepted by Selling Agent this — day of ———, 1932.

By ——— ———, Its ———.

[fol. 112] Statement of Rights of Preferred Stock to be Recommended to the Board of Directors

The holders of the preferred stock shall be entitled to receive cumulative dividends, as and when declared by the Board of Directors, out of the annual net profits of the Corporation, or out of its net assets in excess of its capital as determined pursuant and subject to the provisions of the General Corporation Law of the State of Delaware, at the

rate of seven percentum (7%) per annum, payable annually on the first day of March of each year before any dividends shall be declared or paid upon or set apart for the common stock. The corporation through its Board of Directors, may from time to time redeem the whole or any part of the preferred stock at the price of One Hundred Dollars ($100.00) per share, plus accumulated and unpaid dividends, on January 15, 1932, or any dividend day thereafter. The notice of such redemption shall be mailed to the holder of the stock to be redeemed not less than (30) days prior to the date upon which the stock is to be redeemed, at his address as it appears upon the books of the corporation. In the event that less than all of the outstanding preferred stock of the corporation is to be redeemed, the amount to be redeemed and the method of effecting such redemption, whether by lot or prorata or otherwise, may be determined by the Board of Directors. On and after the date fixed for such redemption, the holders of shares so called for redemption shall cease to be entitled to any further dividends and the respective holders thereof shall have no right or interest thereon or therein, by reason of the ownership of such shares, except to receive the said redemption price, as a debt without interest, upon presentation and surrender of their certificates therefor. In case of any liquidation, dissolution or winding up of the affairs of the corporation, whether voluntary or involuntary, and after payment of all the debts of the corporation, the assets of the corporation shall first be applied to the payment of the preferred stock at par, plus an amount equal to arrearages of dividends, and the remainder shall be distributed among the holders of the common stock, share and share alike. Subject to the General Corporation Laws of Delaware, the voting power shall be vested exclusively in the holders of the common stock.

[fol. 113] Suggested Form for Minutes of Board of Directors' Meeting Authorizing Execution of Agreement with Appalachian Coals, Incorporated

Minutes of Meeting of the Board of Directors of the —— Coal Company Duly Called and Held at the Company's Office in —— at — o'clock —. M. on the — day of ——, 1932.

There were present directors —— —— and, being more than the number necessary for a quorum, Mr. —— ——

presided and Mr. —— —— acted as Secretary of the Meeting.

Mr. —— —— presented to the meeting a copy of the Charter and suggested form of the By-Laws of the Appalachian Coals, Incorporated, and explained the plans and purposes of that organization. He also presented printed form of contract proposed to be entered into between said Appalachian Coals, Incorporated, and coal producers, which form of contract, with accompanying exhibits that are made a part of it, was read in full.

Thereupon, after due consideration, it was, on motion, made, seconded and unanimously carried.

Resolved, that the appropriate officers of this company are hereby authorized and directed to enter into a sales agency agreement, in duplicate, with the said Appalachian Coals, Incorporated, substantially in the form above mentioned, after filling in the blanks, and to execute said contract in the name and, if required, under the seal of this company; and

Resolved further, that the officers of this Company are hereby authorized and directed to subscribe for — shares of the Common Stock and — shares of the Preferred Stock of Appalachian Coals, Incorporated, and to that end to execute in the name of this Company, and, if required, under its corporate seal, the forms of stock subscription paper submitted by the Appalachian Coals, Incorporated.

Resolved further, that each of the following persons, namely, —— ——, is hereby authorized to countersign on behalf of this company the said Subscription Agreement for stock of said Appalachian Coals, Incorporated.

[fol. 114] DEFENDANTS' EXHIBIT "B" FILED WITH ANSWER

The Regional Sales Agency Plan Approved at the New York Conference December 3, 1931

National Coal Association, Washington, D. C.

[fol. 115] Contents

1st. Report of Special Committee which was unanimously adopted by the General Committee.

2nd. The Opinion of Attorney William J. Donovan.
3rd. Supplemental Letter of Attorney Donovan.
4th. Contract Form (Revised) To Be Entered Into Between Proposed District or Regional Sales Agencies and The Individual Coal Producers.
5th. Contract Form To Be Entered Into Between Proposed District or Regional Sales Agencies and Their Sub-Agents.
6th. Committees Appointed By Chairman Bradley for the Various Districts.
7th. List of Those Present At The December 3rd Meeting.

[fol. 116] At the suggestion of President C. E. Bockus, Members of the Board of Directors of the National Coal Association, having operations east of the Mississippi River, gathered in New York City on October 21st to form a committee to consider stabilization measures for the bituminous coal mining industry. A number of persons identified with the industry were invited by the Directors to attend that meeting.

J. G. Bradley was elected Chairman and was authorized to name a Special Committee to make a thorough study. This Special Committee, headed by E. C. Mahan, reported to the General Committee on December 3d and, as noted on the preceding page, this pamphlet contains the report of that Committee and germane exhibits. The General Committee adopted a resolution, asking the Special Committee to continue to function in the interests of the Regional Sales Agency Proposal.

C. B. Huntress, Executive Secretary.

December 7, 1931.

[fol. 117] Report of Special Committee, Which Was Unanimously Adopted by the General Committee

December 2, 1931.

To Mr. J. G. Bradley, Chairman of the General Bituminous Coal Committee:

The Special Committee of Fourteen, to which was referred the matter of studying and reporting upon plans for the general betterment of conditions in the bituminous coal industry, having due regard for the interests of the

coal operators, employees and the public, begs leave to submit this report:

This Committee was appointed to consider various plans for stabilizing the coal industry, including those which were presented at the meeting of your Committee. The Committee has carefully gone into and considered each and every plan submitted at that meeting, together with other plans, and after full discussion and consideration of all of said plans it has reached the conclusion that while all of the individual plans submitted in and of themselves contain meritorious suggestions, no one of them is sufficient to put the industry permanently on a sound and economical basis for the benefit of all parties in interest.

This Committee reached the conclusion that the greatest good to the bituminous coal industry, including owners, producers and employees, as well as to the public, would come from carefully worked out consolidations of the physical properties in producing districts along natural and economic lines, and that proper steps should be taken in each of the producing districts looking toward the eventual consummation of such consolidations. It was fully realized that it will require considerable time to work out consolidations in the several districts, due to the various physical and financial conditions of the different properties in the respective districts, and also to the depressed state of trade and business generally. However, this Com- [fol. 118] mittee recognizes the fact that there must be some immediate steps taken to better conditions in this industry pending the working out of such consolidations.

Consequently, as an initial step that may be taken more promptly, the plan is favored of forming regional or district sales agencies through which the coal produced in the individual districts can be more advantageously and economically sold and distributed. The consideration of this subject, as well as that of the merger of physical properties, raised certain legal questions which this Committee felt should be settled authoritatively before it made any positive recommendations.

Under the foregoing circumstances and for the reasons stated, this Committee procured the advice of an eminent member of the New York bar, Honorable Wm. J. Donovan, and submitted to him for his consideration and determination the various legal questions involved.

After mature consideration, Colonel Donovan submitted to this Committee his written opinion upon these legal questions, with respect to mergers of physical properties and the organization of district or regional sales agencies.

Colonel Donovan reached the conclusion, and so stated in his opinion, that he found no legal obstacle to the bringing about of physical mergers. He also expressed the opinion that he found no insuperable legal difficulties in the way of establishing district or regional sales agencies to accomplish the desired results. He went further and submitted with his written opinion a draft of a suggested general form of contract to be entered into between such proposed district or regional sales agencies and individual coal producers and also a draft of a suggested form of contract between such district or regional sales agencies and their sub-agents. These forms were submitted simply as guides and as setting forth the general matters to be covered thereby, with the realization that they would necessarily have to be modified in some particulars to suit the peculiar conditions existing in the various districts.

[fol. 119] Copies of said written opinion and said proposed forms of contracts are submitted herewith as a part of this report.

After submitting his opinion and the forms of the said proposed contracts, Colonel Donovan appeared before this Committee in person and stated his general opinion on the subjects involved and afterwards, at a prolonged meeting, answered the many questions which the different members of the Committee saw fit to ask him.

After obtaining from Colonel Donovan his opinion on the questions submitted to him and the skeleton form of contract which he submitted therewith, the Committee gave several days to further discussion and consideration of the details which should be covered by the contract between the Selling Agent and the Producer. Colonel Donovan did not have before him the information necessary to cover all these details and made no attempt to do so.

The result of the Committee's further study of the question was to make certain modifications in the form of contract approved by Colonel Donovan, and this modified contract has been submitted to and approved by him as being in no way in conflict with his opinion as to the law. Copies of this modified contract are available to be substi-

tuted for the form attached to Colonel Donovan's opinion, and a copy is herewith submitted as a part hereof.

The opinion of this Committee is that under present conditions the plan of organizing district or regional sales agencies for the purposes set out above offers the greatest promise for immediate betterment of conditions in the bituminous coal industry. It is not claimed that all the ills of the industry will be cured by the adoption of this plan, but it is felt by all the members of the Committee that it will be a real start on the road of progress toward placing the industry upon a saner and sounder economic business basis.

For these reasons, where mergers of physical properties cannot be made now, this Committee recommends the adoption at this time of district or regional sales agencies. And this Committee recommends that your Committee approve [fol. 120] the plan and that your Chairman appoint a special committee of from three to five members in each bituminous coal producing district, and that these Committees present this plan to the operators in their respective districts and procure, if possible, its adoption by them. In appointing such local committees, it is realized that the wishes of the various districts should be observed as to the physical boundaries of such districts, it being thought likely that in many instances certain districts as now designated will unite with other adjoining districts to form larger units.

Your attention is called to several questions that will arise for solution in the different districts and which may be answered in different ways in different districts, owing to local conditions of various kinds.

One of the questions to be decided in each district is as to the classification and grading of coal. It will be seen that the amended form of contract submitted herewith, as between the Selling Agent and the Producer, provides a certain standard for classification. This standard may or may not be suitable in different districts, and the matter of classification and grading of coal should be left entirely to each district.

Another question is whether the Selling Agent shall pay to each mine the money actually received for the coal produced by it, less commission, or whether the money paid to the mines shall be the average price obtained by the

Selling Agent for the various grades and classes of coal. This Committee favors the first method, as being simpler and fairer, and the revised form of contract submitted herewith is prepared upon that basis; but here, again, each producing district should have the right to determine this for itself.

Attention is called to the provision in the proposed contract, setting forth the manner and extent to which each producer shall participate in the total tonnage of coal sold by the Selling Agent, when full running time for all the mines is not practicable. This plan is believed to be equitable and workable and the Committee recommends it, but any particular district may adopt another plan if it so desires.

[fol. 121] Attention is also called to the provision "Fifteenth" of said form of contract, providing that the Producer may designate a sub-agent to sell its coal in accordance with the form of contract with the sub-agent herewith submitted. The question arose as to the extent of the activities of such sub-agent designated by a single producer: that is, whether the sub-agent should be confined to the sale of the coal of that particular producer, or should be a general sub-agent of the Selling Agent for the sale of any and all coals which it might have for sale. It is believed by this Committee that the designated sub-agent should be a general sub-agent of the Selling Agency, selling all coals handled by the Selling Agent, unless the producer designating the sub-agent should expressly stipulate that its activities be limited to the sale of that producer's coal. In the latter event the sub-agent should not be permitted to sell for the producer designating it a greater tonnage than said producer is entitled to under the method of prorating orders and tonnage contemplated by the Selling Agency contract, and this situation is covered by the form of contract submitted herewith.

The Committee deems it proper to refer to and comment upon certain questions which will arise in the process of creating and organizing district or regional sales agencies.

Without attempting to go into all details, a general statement is here made giving some suggestions as to practicable working plan for the proposed selling agency. It goes without saying, of course, that the stockholders of each Selling Agent would organize and elect a board of

directors and officers, but naturally the principal activities of such agency would be conducted by an executive committee on sales, the membership of which would be elected by reason of their knowledge and fitness for the work, including their reputations for honesty and fairness; and it would be the purpose of each group to have its executive committee in charge of sales in almost continuous session, or a majority or quorum of them in continuous session, for the purpose of keeping abreast of the sales situation in the general markets served by the Selling Agent. Such an [fol. 122] executive committee might be composed of from three to eleven persons, depending upon the size of the district represented, the number of persons or producers dealing with the Selling Agent, and the geographical location of the district. It should be the endeavor to have at least one man on the committee thoroughly familiar with the coals and the market practices in connection with the coals from each of the producing districts. It would be the duty of this board to gauge the market demand for coal and the price, and to properly prorate the tonnage sold, from time to time, between the producers represented by the Selling Agent. This committee would fix from day to day or week to week the price at which it would offer coal for sale, and make changes as market conditions justified on all grades of coal; consult and deal with individual producers and with sub-agents representing individual producers, as well as with retail dealers and other purchasers of coal, in order to keep currently advised as to the quantity of available coal and the market demand therefor.

This organization should also provide, temporarily, at least, for engineers to establish classifications and uses of the coals, as provided in the contract.

The Selling Agent would also have to be provided with a complete accounting and statistical organization, to properly handle all the work incident to its duties.

It should be contemplated that major advertising should be done by and through the Selling Agent; that a careful study should be given to advertising and proper expenditures made from time to time for the purpose of promoting the uses of coal generally, and for advertising the coals and service to be furnished by the Selling Agent and its sub-agents, in particular.

It should also be understood that the organization would maintain close contact with the retail coal dealers associations and the retail dealers in all the principal markets, for the purpose of cooperating with them in bringing about [fol. 123] better business practices in the sale and distribution of coal from the producers represented by the Selling Agent. It is believed that a great deal can be done by such cooperation to increase the use of coal in competition with oil, gas, electricity and other fuels; and that much can be done to strengthen the distribution of coal through retailers and to protect the retailers and to centralize and stabilize their credits, all of which will automatically result in the better merchandising of coal.

The Selling Agent should also maintain an efficient traffic department for the routing and handling of all coal shipped. The point is here stressed that there would be no duplication of selling effort of the Selling Agent and sub-agents, but a lessening of existing duplication, which necessarily results in a decrease in the cost of selling. The costs of the general sales agency, other than advertising and accounting, should not be very large in amount per ton, and should be more than offset by the reduction in expense of the sub-agents.

One question to be determined by the various district committees is the amount of capital which will be necessary to carry on its business. The Selling Agent will have to be financed and the proper amount of capital to be required and the sources from which such capital shall be obtained are vital questions.

It would seem proper that, for the companies which will designate no sub-agents and which will sell direct through the Selling Agent, a capital of approximately $1.50 a ton on each ton of coal sold per month would be about the amount of working capital required. For the coal sold through the sub-agents no appreciable working capital will be required, as the sub-agents should finance all their sales.

Therefore, it may be necessary to have two classes of stock: a voting class, determined by the tonnage of each company entering the agency, and an investment stock, determined as to each producer by the amount of money required to handle its output. These two stocks would be sold concurrently, but the investment stock or debentures would have no voting power.

[fol. 124] Probably 90 per cent of the coal going in to the agency in the beginning will be sold by designated sub-agents, in which event the capital required as to that coal will be small. It might be that some of the smaller producers would be prevented from going into the agency, although desiring to do so, by their inability to provide the necessary working capital, and to meet this situation it would be well to require each person selling through a sub-agent to subscribe for working capital stock, or investment stock or debentures, equal to one-tenth of the amount that he would be required to subscribe for were the Selling Agent selling his coal direct instead of through a sub-agent. In other words, if we have a Selling Agent with a million tons of coal per month, it would indicate a working capital of $1,500,000, but if 90 per cent of this coal is sold through sub-agents the capital would be $150,000 from those selling direct through the Selling Agent, and 10 per cent of $1,350,000, $135,000, would be subscribed by the producers designating the sub-agents.

Also, it might be well to have each producer taking stock in the Selling Agency to give an option on the said stock to the Selling Agency at the book value thereof, said option to be exercised at any time the producer retires from business voluntarily, by working out its mines or by withdrawing from its business by merger, sale, or otherwise disposing of its property; and contracts should be entered into between the Selling Agent and the Producer providing against each producer evading or violating its sales contract by merging, selling or otherwise disposing of its property without proper provisions for carrying out its said sales contract.

It is suggested that the various districts, in procuring their charters and in formulating the by-laws, should do so in such manner as to give full freedom for the accomplishment of the above indicated objects.

This Committee approves the suggestions that after the Sales Agency has been duly chartered and organized, the stock thereof be held by voting trustees for a stated period [fol. 125] period of years. The voting trustees would be elected on the basis of their ability and character. This fact would inspire confidence in the stability and efficiency of the agency.

This committee believes that the adoption of this plan in principle will tend to the stabilization of bituminous coal production in the respective districts, and will develop for the operators a fair return on the capital invested and for the employees a better return in earnings.

When your Committee first met to discuss and consider the questions referred to it, differences of opinion immediately developed on many points. After honest, continued and frank discussion, in a spirit of "give and take," having in mind always the conviction that it was necessary to preserve only the essentials, the Committee gradually eliminated such differences of opinion until it was able to adopt this report as embodying its best judgment.

Respectfully submitted.

Special Committee:

E. C. Mahan (Chairman), President, Southern Coal & Coke Co., Knoxville, Tenn.
W. J. Cunningham, President, Crummies Creek Coal Co., Crummies, Ky.
C. C. Dickinson, President, Dickinson Fuel Co., Charleston, W. Va.
J. D. Francis, Vice-President, Island Creek Coal Co., Huntington, W. Va.
Michael Gallagher, President, Northwestern Mng. & Exchange Co., Cleveland, Ohio.
Geo. B. Harrington, President, Chicago, Wilmington & Franklin Coal Co., Chicago, Ill.
R. H. Knode, President, Stonega Coke & Coal Co., Philadelphia, Pa.
J. D. A. Morrow, President, Pittsburgh Coal Co., Pittsburgh, Pa.
W. D. Ord, President, Empire Coal & Coke Co., Landgraff, W. Va.
C. F. Richardson, President, West Kentucky Coal Co., Sturgis, Ky.
W. L. Robison, Vice-President, Youghiogheny & Ohio Coal Co., Cleveland, Ohio.
J. W. Searles, President, Pennsylvania Coal & Coke Corp., New York City.

R. H. Sherwood, President, Central Indiana Coal Co., Indianapolis, Ind.
S. L. Yerkes, President, Grider Coal Sales Agency, Birmingham, Ala.

[fol. 126] Opinion of Attorney William J. Donovan

Opinion Letter Submitted to a Committee Representing Certain Producing States in the Bituminous Coal Industry

Dated November 5, 1931

William J. Donovan, 41 Broad Street, New York, N. Y.

[fol. 127] November 5, 1931.

Edgar L. Greever, Esq., Biltmore Hotel, New York, New York.

Dear Mr. Greever: The legal questions which you submitted to me on behalf of a committee representing the producers of bituminous coal operating in the States of Pennsylvania, Ohio, West Virginia, Virginia, Kentucky, Tennessee, Illinois and Indiana have been considered.

These questions are: First: Whether the producers representing all or a large part of the total production in a particular coal producing district may effect a consolidation of their several physical properties and assets into a single unit; and, second, as an alternative whether the dominant producers in the industry may by agreement or concerted action adopt a plan for the industry, whereby the producers in each of the producing districts shall enter into an agreement or agreements for the sale of the coal produced therein through a common selling agency. These questions will be considered in the order stated.

Statement of Facts

The following statement of facts is a summary of the information furnished to me by your Committee.

Most of the bituminous coal produced in the United States comes from the eight producing states named. These states are also nearest to the greatest coal consuming mar-

kets in this country, namely the northeastern Atlantic seaboard states.

The statistics which you have furnished with respect to the production, consumption, productive capacity, etc., of the bituminous coal industry have reference to the United States, as a whole. It is stated that the competitive situation which these statisics reflect is typical of that existing in the eight states mentioned.

[fol. 128] During the past ten years, the average price received by the producers for bituminous coal has steadily declined and today the price is below the average cost of production.

This decline in the price of coal during the period 1920 to 1931, inclusive, is reflected in the following table, showing average spot prices for bituminous coal during these years:

Year	Price per ton
1920	$5.64
1921	2.55
1922	3.64
1923	2.77
1924	2.08
1925	2.06
1926	2.21
1927	1.99
1828	1.80
1929	1.79
1930	1.75
1931	
Jan.	1.78
Feb.	1.77
March	1.68
April	1.64
May	1.60
June	1.56¼
July	1.58
August	1.56¼
September	1.61¾

[fol. 129] The following table shows the production, consumption and productive capacity in tons and the days

worked of the bituminous coal industry in the United States from 1920 to 1930, inclusive:

(1) Year	Production	Consumption	Days worked	Productive capacity
1920.....	568,667,000	508,595,000	220	775,455,000
1921.....	415,922,000	391,849,000	149	837,427,000
1922.....	422,268,000	426,915,000	142	892,115,000
1923.....	564,565,000	518,993,000	179	946,198,000
1924.....	483,687,000	484,004,000	171	848,574,000
1925.....	520,053,000	499,193,000	195	800,081,000
1926.....	573,367,000	532,581,000	215	800,047,000
1927.....	517,763,000	499,801,000	191	813,240,000
1928.....	500,745,000	498,628,000	203	740,017,000
1929.....	534,989,000	519,555,000	219	732,862,000
1930.....	466,786,000*	447,239,000	175*	814,624,000

* Partly estimated.

(1) NOTE.—Production and consumption figures taken from Bureau of Mines reports. Capacity figures computed by dividing actual production by average number of days worked and multiplying by 300. This method of arriving at capacity is the only one available. However, it should be noted that on the one hand it assumes that mines can operate 300 days a year at the same rate as for the number of days actually operated; but on the other hand it covers only mines actually operating at some period during the year and takes no account of potential capacity closed down for the entire year.

This excessive productive capacity in the bituminous coal industry may, to some extent, be traced to the World War, when this country produced immense supplies of manufactured products to supply the allied armies and peoples. In order to meet the demand for coal at that time it was necessary for the producers to acquire additional mining machinery and equipment and to expand and develop old mines and to open new ones. A contributing factor has been the increased use of substitutes for coal, such as oil, natural gas and water power and the consequent lessening of the consumption of coal. At the same time the increased efficiency in the utilization of coal for electrical power purposes has tended to prevent the growth and development of the bituminous coal industry.

In the matter of merger or consolidation of physical properties and assets it is understood that specific plans remain to be developed.

[fol. 130] Also in the proposal for a common selling agency the several districts, each of which will be represented by one or more selling agencies, have not been definitely determined. It is expected, however, that, in general, these districts will be co-extensive with the districts now covered by producers' trade associations. The following is a list of producing areas in which organizations exist today:

State	Name of association	Area
Illinois	Illinois Coal Bureau	Illinois.
Indiana	Indiana Coal Prod. Assn	Indiana—stripping operations.
Indiana	Coal Trade Association of Indiana.	Indiana—shaft operations.
Kentucky	Harlan County Coal Operators Association.	Harlan County and parts of Leslie, Perry and Letcher Counties.
Kentucky	Hazard Coal Operators Exchange.	Breathitt, Lee and Owsley Counties, and parts of Perry, Leslie, Letcher and Knott Counties.
Kentucky	West Kentucky Coal Bureau.	Western Kentucky.
Kentucky and West Virginia.	Operators' Association of Williamson Field.	Wayne County and parts of Mingo and McDowell Counties, West Virginia, and parts of Pike and Martin Counties, Kentucky.
Kentucky and Tennessee.	Southern Appalachian Coal Operators Association.	Rockcastle County, and parts of Laurel, Knox, Bell, McCreery and Whitley Counties in Kentucky and parts of Scott, Anderson, Campbell and Claiborne Counties, Tennessee.
Ohio	Central Ohio—no association.	
Ohio	Eastern Ohio Coal Opers. Assn.	Belmont, Harrison and Jefferson Counties.
Ohio	Southern Ohio—including the Hocking field—no association.	
Pennsylvania	Butler-Mercer — Northwestern Penna.—no association.	
Pennsylvania	Central Pennsylvania Coal Prod. Assn.	Includes mines in 16 counties in the central part of the State.
[fol. 131]		
Pennsylvania	Fayette-Greene—no association.	Parts of Fayette and Greene Counties.
Pennsylvania	Coal Operators Association of the Thick Vein Freeport Seam of Pennsylvania.	Parts of Allegheny, Armstrong, Butler and Westmoreland Counties.
Pennsylvania	Pittsburgh—no association.	Washington County and parts of Greene, Fayette, Westmoreland and Allegheny Counties.
Pennsylvania	Somerset—no association	Somerset County.
Pennsylvania	Westmoreland-Ligonier — no association.	Part of Westmoreland County.
Tennessee	Southern Appalachian Coal Opers. Assn.	See Kentucky.
Virginia	Virginia Coal Operators Association.	Southwest Virginia.
West Virginia	Kanawha Coal Operators Association.	Parts of Kanawha, Clay, Nicholas, Lincoln, Fayette, Raleigh and Boone Counties.
West Virginia	Logan Coal Operators Association.	Logan County and part of Lincoln County.
West Virginia	New River Coal Operators Association.	Summers County, and parts of Fayette, Greenbrier, and Raleigh Counties.
West Virginia	Northern West Virginia—partly covered by Fairmont Coal Operators' Association.	Includes all Northern West Virginia, except Pan Handle and Upper Potomac.

State	Name of association	Area
West Virginia	Operators' Association of Williamson Field.	See Kentucky.
West Virginia	Pan Handle—no association.	Hancock, Brooke, Ohio and Marshall Counties.
West Virginia	Pocahontas Operators Association.	All of Mercer County and part of McDowell County.
West Virginia	Upper Potomac—no association.	Tucker, Mineral and Grant Counties.
West Virginia	Winding Gulf Operators Association.	Parts of Raleigh and Wyoming Counties.

There are a number of operations in the central part of the state not included in any organization territory.

[fol. 132] It has been represented that in general, each of the districts mentioned above is a comparatively small and unimportant coal consuming area and that its principal market lies outside the producing district. In this outside market it is said that there is active competition from coal produced in other districts. It is estimated, for example, that more than 80 per cent of all the coal produced in these districts is sold outside of the district in which it is produced in competition with coal from other districts. It is assumed that the price of coal is determined not by competitive conditions existing in the respective producing districts, but by the competitive conditions existing in areas where coal from several districts is sold.

For the purpose of considering the proposal for a common selling agency a plan is suggested under which marketing companies may be formed and operated. In broad outline, that plan should include the following:

1. A Marketing Company would be formed in each producing district. The Marketing Company should be a corporation with the power to buy and sell coal and to sell and distribute coal on a commission basis for the producers operating in that district.

2. Each of the producers in that district desiring to join the plan would subscribe for and agree to purchase stock of the marketing corporation in an amount which would represent his proportion of the total of the average yearly production of each producer subscribing to the stock during the four calendar years of greatest production of each producer, these years to be selected by each producer for himself, within the years 1922 to 1930.

3. Each of the producing companies, on subscribing to the stock of the marketing company, would agree that the

certificates for the shares of stock of the Marketing Company to which it is entitled, would be held by voting trustees and voted by them for the period of the agreement.

[fol. 133] 4. Each company would enter into a marketing agreement with the Marketing Company in substantially the form appended to this opinion and marked "Exhibit A."*

In examining this proposed form of marketing agreement, it will be observed that:

A. The Marketing Company will be the selling agent of each producer subscribing to its stock.

B. In order to disturb existing selling channels as little as possible, each producer is given the option to designate sub-agents of the Marketing Company in the sale of coal. An outline of a proposed form of Sub-Agent Agreement is enclosed with this letter and marked "Exhibit B."

The participation of the Producer in the total tonnage of coal which shall be sold by the Selling Agent during the term of this Agreement shall be a percentage of such total sales determined by dividing the average yearly production in tons of the Producer for the years of greatest production set forth in paragraph "First" of the agreement annexed marked "Exhibit A" by the total of the average annual production in tons during the period of greatest production of the several producers who shall have entered, or shall thereafter enter into substantially identical or similar agreements with the marketing company in accordance with the terms and conditions therein contained.

Statement of the Law

A. Legality of Consolidations of Physical Assets

No specific plans of the consolidation of the physical properties and assets of the companies of particular districts have been submitted. In the absence of such plans it is impossible to pass upon their legality. At this time only the general rules of law that would be applicable may be stated.

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*Amended contract submitted herewith takes the place of this.

The legality of any proposed consolidation is to be determined with particular reference to the provisions of the Sherman Act, 26 Stat. 209.

[fol. 134] The Sherman Act forbids contracts or combinations which restrain or monopolize trade. While the language of the Statute is broad enough to include in its condemnation every restraint of trade, the Supreme Court has adopted the "rule of reason" as the rule of interpretation under which the law is to be administered. United States v. Standard Oil Co., 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106. It is the effect of this rule that "only such contracts and combinations are within the Act as by reason of their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." Nash v. United States, 229 U. S. 373, 376.

It is necessary to keep in mind that in determining the legality of any particular consolidation the Supreme Court has said:

"The law * * * does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense when unaccompanied by unlawful conduct in the exercise of its power. United States v. United States Steel Corporation, 251 U. S. 417, 451." United States v. International Harvester Co., 274 U. S. 693, 708.

In the absence of an intent to monopolize, it is therefore apparent that great size is not determinative of the legality of a combination, "for the real test of monopoly is not the size of that which is acquired but the trade power of that which is not acquired." United States v. United States Steel Corporation, 223 Fed. 55, 68.

In applying this test, a particular consolidation of properties of producing companies must be compared in size with similar consolidations in other districts competing for the sale of coal in the principal consuming market, as well as with producers located in its producing area. Judged by this test it must be determined in each instance whether a particular consolidation will have monopolistic power in any substantial market, which would be illegal.

[fol. 135] Each consolidation, therefore, must be considered upon its own facts. As the situation in the coal industry has been presented, there would seem to be no insuperable legal obstacles to such consolidations.

B. Legality of the Plan to Establish Joint Selling Agencies

It is assumed that the plan for a common selling agency will be adopted, if at all, by the entire industry. This raises a preliminary question as to the legality of such action by the industry.

In my opinion, no legal obstacle is presented, provided that no effort is made to coerce or compel recalcitrant producers to subscribe to the plan and that the action taken by each producer is the result of his own determination. This conclusion is fortified by the statement of the Supreme Court that an agreement to end a ruinous trade war with resultant loss to the industry and to the public is not an unreasonable restraint of trade within the meaning of the Sherman Act. United States v. American Tobacco Company, 221 U. S. 106, 177. See also Standard Oil Co. v. United States, 221 U. S. 1, and National Association of Window Glass Manufacturers v. United States, 263 U. S. 403.

An agreement to end a ruinous competitive condition in the coal industry resulting from excess productive capacity and aggravated by excessive and unnecessary selling expenses, and having the effect of driving the price of coal below the average cost of production, would seem equally to be a reasonable agreement within the meaning of the Sherman Act.

In considering, under the Sherman Act, the legality of a plan for a common selling agency it is assumed that the plan would be adopted and put in force in each of several bituminous coal producing districts; that the number of producers adopting this plan in each district would represent a large percentage of the total productive capacity of that district and that there would remain in each district substantial competition from producers who would [fol. 136] not enter into the plan. In each district it is stated that the great bulk of the coal produced is sold outside the district in which it is produced and in competition with coal produced in one or more other districts, and

it is in such competitive markets that the price of bituminous coal is determined. Therefore, after such a plan is adopted there would remain active competition in every substantial coal market between the various common selling agencies and producers who do not join in the plan.

This opinion is also based on the understanding that there will be no agreement, express or implied, which will limit or curtail competition between the several selling agencies.

In expressing an opinion at this time no more can be done than to state the principles that must be observed in the formation and activities of each such common selling agency. The question of legality must be considered in connection with the relevant facts that may exist in each producing district, and until such facts are available and have been considered this opinion must not be taken to approve the legality of a plan for any particular selling agency.

The adoption of this plan by certain producers in a particular producing district will, of course, eliminate competition formerly existing between the parties. The facts which you have furnished indicate, however, that the controlling purpose of the agreement is to eliminate unnecessary duplication of selling effort and thus prevent or at least lessen the losses now suffered by the producers. It is, of course, hoped that forced sales of coal below the actual cost of production would be largely eliminated. It is also apparent from these facts that the public would be amply protected by competition from coal produced in other districts.

The test to be applied in determining whether the elimination of competition between the companies entering the plan is unreasonable within the meaning of the Sherman Law, was stated in United States v. Addystone Pipe Co. 85 Fed. 271, 282-3. In an opinion written by the late Chief Justice Taft, the Court discussed the meaning of the "rule of reason" and declared that at common law and under the Sherman Act:

[fol. 137] "The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if

the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons. First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and, therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." At pages 282-283.

The situation in the bituminous coal industry indicates that the proposed plan is to be undertaken as a necessary defensive measure to prevent a breakdown of the industry and that the price of coal would still be determined in a freely competitive market, namely the consuming market in which coal from the various producing districts will actively compete for the business. The incidental elimination of competition between units in a particular district would seem, therefore, not to be an unreasonable restraint of trade within the meaning of the case.

The proposed plan is in effect a consolidation of selling effort. Therefore, what we have said regarding consolidation of properties is, in my opinion, equally applicable in determining the legality of any plans for common selling agencies.

[fol. 138] The proposed plan would establish an exclusive selling agent of certain producers in a particular district. It may, therefore, be urged that the legality of the proposed plan should be tested by the principles stated in decisions dealing with joint, exclusive selling agents, and not by the test applied to consolidations and mergers. The leading case under the Sherman Act dealing with such selling

agents is Continental Wall Paper Co. v. Louis Voight & Sons, 212 U. S. 227. This case involved an action by a joint selling agent on a contract. The defense was interposed that the contract was in restraint of trade and therefore unenforceable. It appeared that producers of wall paper controlling a practical monopoly of its manufacture and sale had entered into an agreement to fix the price of wall paper and to require jobbers and wholesalers to buy their entire supply from the Continental Wall Paper Co. which acted as a joint selling agent. The court held that the Continental Wall Paper Co. was the agent of an unlawful combination and that the illegality of the combination might be set up as a defense to a suit to recover the contract price for goods sold to the defendant.

This case is distinguishable from the facts now being considered for the reason that the Continental Wall Paper Co. enjoyed a practical monopoly, which would have been illegal in any event.

In American Sea Green Slate Co., et al. v. O'Halloran, et al., 229 Fed. 77, the Circuit Court of Appeals for the Second Circuit considered the legality of the formation of a joint selling agency by all of the producers of a particular kind of slate. The court refused to pass upon the legality of this arrangement under the Sherman Act, but it indicated that the appointment by competitors of a joint selling agency is not unlawful, per se, the question of legality being dependent upon the particular facts in each case.

This would seem to be a correct statement of the law and in my opinion the adoption of the proposed plan, under the conditions herein stated, will not fall within the condemnation of the law.

[fol. 139] It may be urged that the proposed establishment of common selling agents would constitute a price agreement among the parties thereto.

The leading case dealing with the legality of price agreements is United States v. Trenton Potteries, et al. 370 U. S. 392. In that case the Court held that an agreement among competitors controlling eighty per cent of the business of manufacturing and distributing sanitary pottery in the United States to fix and maintain uniform prices was in violation of the Sherman Law, whether the prices so agreed upon were reasonable or unreasonable. That decision did not involve any plan for a common selling agency and there-

fore, in my opinion, would not be applicable to the plan under consideration.

Moreover, the facts before the court clearly indicated that the parties to the agreement so dominated the entire industry that there was necessarily an entire absence of any price competition in any market in the United States. The plan under consideration, however, contemplates that active competition will continue in all substantial markets.

Not every agreement affecting prices is illegal under the Sherman Act. In Chicago Board of Trade v. United States, 246 U. S. 231, the Supreme Court considered the legality of an agreement by members of the Chicago Board of Trade to control prices during certain hours of the day. In holding that the agreement was legal, the court laid great stress on the fact that it related only to a small portion of the commerce.

In outlining the test of legality, Mr. Justice Brandeis said:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason [fol. 140] for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." At page 238.

If, as has been stated, it can be shown that the effect of the consummation of the proposed plan will be to regulate and promote orderly marketing and that the public will continue to have that competition which the anti-trust laws were intended to secure, then, in my opinion, the proposed plan will fall within the doctrine announced by Mr. Justice Brandeis.

The question as to whether or not the consummation of the proposed plan will involve an illegal boycott of existing selling agents has also been considered. It is evident that at least some of the existing selling agents will be deprived

of their business. The proposed plan, however, does not involve any agreement on the part of any producers not to sell coal through the agency of any particular selling agents or class of agents and in order that there may be no charge made against any producers of a boycott, provision has been made in the annexed form of selling agency agreement, whereby each producer may designate any existing selling agent as the sub-agent of the Selling Agent appointed by it.

The annexed agreement provides that the books and records of each producer shall be open at all reasonable times to the inspection of the Selling Agent and that the Selling Agent shall at certain periods furnish to each producer a full report of all coal of all producers sold by him, showing the amount of coal of each producer sold and full details of these transactions. This report necessarily covers only past and closed transactions and the information disclosed is used solely for the purpose of enabling each producer to determine the performance by the Selling Agent of its contractual obligation. In my opinion, there is no violation of law in the disclosure and use of this information in accordance with the terms of the annexed agreement.

In conclusion, then, the principles that must be followed so far as any consolidation of physical assets is concerned [fol. 141] have been stated. In regard to the proposed plan for a common selling agency, it is my opinion that such a plan may be lawfully adopted and carried forward by this Committee, provided that the qualifications and conditions stated in this opinion are observed in good faith by the industry. It must be made clear, however, that this opinion is not intended to approve the legality of the establishment of any particular selling agent in any particular district, that each such case must be considered in connection with the relevant facts that exist in each producing district, and that the facts so developed must be tested by the principles stated in this opinion in order to determine finally the question of the legality of the establishment of each such selling agent.

Very truly yours, (Signed) William J. Donovan.

[fol. 142] Supplemental Letter of Attorney Donovan

Law Offices of Donovan and Raichle, 41 Broad Street, New York, N. Y.

November 30, 1931.

Edgar L. Greever, Esq., Biltmore Hotel, New York, N. Y.

DEAR MR. GREEVER: I have examined the revised form of the proposed Marketing Agreement which you have submitted for my consideration. I am attaching hereto (1) copy of this revised Marketing Agreement and (2) a copy of the Form of Marketing Agreement which was enclosed in my letter of November 5, 1931.

The proposed modifications of the original draft of Marketing Agreement occur in paragraphs numbered "First," "Third," "Fourth," "Sixth," "Eleventh," "Thirteenth," "Fifteenth" and "Seventeenth." No changes are now contemplated in any other paragraphs.

With the possible exception of paragraphs "Fourth" and "Fifteenth," the proposed changes do not materially affect the nature of the proposed agreement.

Paragraph numbered "Fourth" prescribes a method for prorating tonnage which differs materially from that suggested in my letter to you. I understand, however, that [fol. 143] the present actual shipping capacity of the respective producers is dependent on car allotments and that these allotments in general are a fair measure of the relative size and competitive importance of the respective Producers. The proposal contained in paragraph "Fourth" will therefore utilize existing facilities for prorating tonnage and will not result in discriminating against any Producers.

Paragraph numbered "Fifteenth" provides in part as follows:

"Fifteenth. The Producer may at any time designate any one person, firm or corporation to act as a Sub-agent of the Selling Agent, to sell the coal of the Producer, and said Sub-agent may sell other coal which the Selling Agent has for sale, unless the Producer specifically limits the Sub-agent to the selling of coal produced by it, subject to all the terms and conditions of this Agreement and on the

terms and conditions contained in the form of Sub-Agents' agreement annexed hereto and marked, 'Schedule B,' upon furnishing to the Selling Agent proof that the Sub-agent is financially responsible and able to meet the obligations to be assumed by it.

"In case such limited Sub-agent makes sales contracts for coal during periods of market shortages, under the conditions set out in paragraph 'Fourth' hereof, in excess of the pro rata share of the Producer so designating such Sub-agent in the total sales of the Selling Agent, the Selling Agent shall have the right to offer to other producers of like character of coal the said excess tonnage, and the Sub-agent shall be entitled to its commissions on said excess from the Producer accepting the orders therefor."

At our conference this morning the question arose as to whether the effect of this paragraph was to permit the Producer and not the Selling Agent to dictate the nature and scope of the Sub-agency of the Selling Agent. It was pointed out, however, that the Selling Agent will be entirely free to refuse to contract with any Producers and [fol. 144] that it will therefore be within the power of the Selling Agent to reject any condition which it believes onerous.

It is my conclusion that the proposed changes in the Marketing Agreement do not materially alter the question of law discussed in my letter of November 5, 1931. I therefore see no reason for changing the opinion expressed in that letter.

Sincerely yours, (Signed) William J. Donovan.

[fol. 145] EXHIBIT A (Revised)

Contract Form to be Entered into Between Proposed District or Regional Sales Agencies and the Individual Coal Producers

Agreement, made this — day of ——, 193-, by and between A, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Producer," and B, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Selling Agent," witnesseth:

Whereas, the Producer is the owner of certain coal mines located at —— and ——, in the States of —— and ——, and is engaged in the mining and production of coal; and

Whereas, the Selling Agent is entering into the business of buying and selling coal and of selling and distributing coal on a commission basis for various producers operating in the States of —— and —— in the producing territories generally known as the —— district and is prepared to sell and distribute coal of the kind and character produced by the Producer on a commission basis; and

Whereas, this agreement is one of a number of identical or substantially similar agreements between other coal producers operating in the —— district and the Selling Agent;

[fol. 146] Now, therefore, for and in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto hereby covenant and agree as follows:

First. The Producer represents that during the calendar years from 1922 to 1930, inclusive, the average annual production and sale of coal of the Producer was — tons; and that, in the normal course of business, the Producer's mines are of sufficient capacity to maintain the present rate of production during a period of — years. A list of the Producer's mines is attached hereto, showing the date each was developed, and production each year during the life thereof, the present rated capacity, and the remaining recoverable tonnage in the land owned or leased by the Producer adjacent and available to same.

Second. The Producer hereby appoints the Selling Agent as its exclusive agent for the sale of the coal produced by it in its mines located at —— and ——, in the States of —— and ——, and the Selling Agent hereby accepts the appointment as such selling agent, all on the terms and conditions hereinafter contained; provided, however, that the Producer hereby expressly reserves from the terms of this agreement such coal as may be produced and used by it in the operation of its mines or which it may furnish or sell to its employees for their use, or which remains to be delivered on contracts now in force and not yet completed at the date of the taking effect of this

agreement, a list of which contracts, with informative data, is attached hereto and marked "Schedule A."

Third. The parties hereto agree that, as soon as may be after the taking effect of this agreement, the Selling Agent will establish a standard classification for all coal which it sells as agent, based upon the suitability of the [fol. 147] coal for particular purposes, such as domestic coals, gas coals, by-product coals, metallurgical coals and steam coals, and such other classifications as may be decided upon by the Sales Agency. These classifications shall give regard to chemical analysis, including (a) moisture, (b) volatile matter, (c) fixed carbon, (d) ash, (e) sulphur, (f) British Thermal Units, and (g) fusion point of ash. The Selling Agent will also establish a standard classification of sizes for the various grades from the mines of each producer whose coal it sells.

The Selling Agent shall promptly give to the Producer written notice of the standard of classifications established by the Selling Agent and of the classes in which the Selling Agent has placed the coal of the Producer and if, within twenty days from the receipt of such notice, the Producer shall not make any objection thereto, the classification of the coal of the Producer so established shall be final and binding on the Producer until a different classification of the coal of the Producer has been made by the Selling Agent. In the event that, within such period of twenty days, the Producer shall give written notice to the Selling Agent that it objects to such classification of its coal, and specifies its objections, the Producer shall have the right to have a re-classification made of its coal, such re-classification to be made by a competent, disinterested and experienced coal-mining engineer to be designated by the parties hereto. In the event that the parties hereto shall be unable to agree upon such engineer, each party shall appoint one engineer and the two so appointed shall appoint a third engineer, and the three engineers so appointed shall re-classify said coal, with due regard to the several factors stated in this paragraph. The classification of the coal of the Producer so determined shall be final and binding on the parties hereto. In the event that any change shall be made in the classification of the coal of the Producer established by the Selling Agent as a result of action

taken by the Producer pursuant to this paragraph, all expenses in connection therewith shall be divided equally [fol. 148] between the Producer and the Selling Agent, but if no change shall be made in the classification, such expenses shall be paid by the Producer.

Pending the establishment and classification of grades of coal as above provided, the Selling Agent shall classify such coals as nearly as possible in accordance with the classification furnished by the Producer; and to this end the Producer shall furnish the Selling Agent with a statement for the year 1930 showing the uses for which its coal was sold during the year 1930, the chemical analysis of the coal from each mine, and for each grade of coal from each mine, the sizes of the screens used at each mine, the number of tracks available and showing the number of grades that can be made at one time and the percentage that each grade bears to the total mine run coal produced.

Fourth. It is further understood and agreed by and between the parties hereto that the Selling Agent will use its best efforts to sell all the coal produced by the Producer at the best possible prices obtainable, and that it is likewise obligated to sell all the coal produced by other producers whose coal it sells, at the best possible prices obtainable, or so much thereof as the market will justify; but it is further understood and agreed that the demand for coal of different grades, uses and classifications varies materially from season to season and from time to time, depending upon the industrial market and weather conditions, and that at times there is a greater demand for coal suitable for certain purposes than at other times and, therefore, the Selling Agent will be able at times to sell particular classes of coal in greater quantities than it may be able to sell other classes of coal. When the demand is not sufficient to absorb the output of all producers represented by the Selling Agent, the participation as between the various producers, as nearly as may be, shall be as follows:

In the event the demand at the time this contract becomes effective is not sufficient to operate the mines of all producers represented by the Selling Agent upon a full time basis, then the participation of the Producer in the [fol. 149] total sales of the Selling Agent for the first calendar month after this contract goes into effect, shall

be such percentage of the total sales made by the Selling Agent for that month that the total car allotment of the Producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the Selling Agent, for the same period; and thereafter the monthly participation of the Producer in the total monthly sales made by the Selling Agent shall be a percentage equal to the percentage the producer's car allotment for the second preceding calendar month bears to the total car allotment of all the producers whose coal is sold by the Selling Agent for the second preceding calendar month; it being understood, however, that these percentages are subject to variation due to variations in the sale of the different sizes, grades and qualities of coals, as above set out; but that it is the purpose of this and all similar agreements that the Selling Agent will, over each annual period, as nearly as conditions will permit, all factors considered, give each producer as nearly the same running time as is reasonably possible.

Fifth. The Selling Agent agrees that, subject to the terms of this agreement, insofar as possible, it will sell the coal of the Producer in the markets to the same customers and under the mine name or trade-name or names that the Producer has heretofore sold such coal, and shall maintain the trade-names and good-will of the Producer.

Sixth. During the term of this Agreement the Selling Agent is hereby authorized by the Producer to sell the coal of the Producer, subject to the conditions hereinafter stated, at the best price or prices obtainable under existing competitive conditions and with due regard to the quality, preparation and classification of the coal to be sold; provided, however, that the Selling Agent shall make no contracts of sale, or sales, calling for future deliveries of coal from the mines of the Producer after sixty days from the date of such contract or sales, without first obtaining the written authorization of the Producer thereto.

[fol. 150] Seventh. Subject to the provisions of this Agreement, the Producer agrees promptly to fill all orders taken by the Selling Agent hereunder; to prepare all coal to be shipped by the Producer under this Agreement in accordance with good practice; to screen all such coal as

directed by the Selling Agent and as the screening equipment of the Producer will permit; and to ship all such coal in the kind of equipment indicated by the Selling Agent; provided, however, that the Producer shall not be liable for failure to make shipments due to strikes, lockouts, car shortages or any other cause beyond its control. The Selling Agent shall have the right to inspect at the tipple all the coal of the Producer to be shipped pursuant to contracts of sale made by the Selling Agent, and, subject to the conditions herein contained, to determine all questions of classification, grade, preparation and quality with respect to such coal.

Eighth. The Selling Agent shall have authority to make allowances and adjustments with purchasers on account of any complaint of any purchaser resulting from causes within the control of the Producer and shall deduct the amount of such allowances and adjustments from the sale price of the coal before the commission of the Selling Agent is computed and the amount to be paid the Producer is determined; provided, however, that in all such cases the Producer shall first be given an opportunity to investigate any such claims and make its representations to the Selling Agent in regard thereto. The Selling Agent shall bear the cost of any allowances or adjustments with the Producer on account of any complaint of any purchaser resulting from causes within the control of the Selling Agent.

Ninth. The Producer agrees to pay to the Selling Agent a commission of — per cent of the gross selling price, f. o. b. at the mines, on coal shipped in accordance with the terms of this agreement; and the Selling Agent shall deduct the said commission from the proceeds of all sales before making payment to the Producer, as in paragraph "Tenth" provided.

[fol. 151] Tenth. All coal sold hereunder shall be paid for and settlements made on the basis of weights furnished by the Producer, which weights shall be railroad scale weights at scale nearest to the point of origin. On the 20th day of each calendar month during the term hereof the Selling Agent shall account and pay to the Producer the full actual purchase price of all coal of the Producer sold by the Selling Agent under this Agreement for which payment to the

Producer has not theretofore been made and on which railroad weights have been received by the Selling Agent prior to the 10th day of that month, less any and all commissions and/or deductions authorized under this Agreement.

Eleventh. All sales shall be made by the Selling Agent for the account of the Producer, but shall be invoiced to the Purchaser in the name of the Selling Agent and payment shall be made to the Selling Agent by the Purchaser. A copy of each such invoice shall be sent to the Producer at the time it is sent to the Purchaser.

It is understood and agreed between the parties hereto that all contracts for the delivery of coal extending over a period of sixty days from the effective date thereof, shall be signed by the Purchaser, the Sub-Agent, if any, the Selling Agent and the Producer; and that the Producer shall either sign and return the said contract within five days after the receipt of same from the Selling Agent, or within such less time as the Selling Agent notifies the Producer the Selling Agent must accept the same and notify the Purchaser; and that the rejection of any contract may necessarily result in the restriction of the pro rata share of the business on such grade of coal as is available for distribution by the Selling Agent.

It is understood and agreed that each Producer will designate to the Selling Agent two or more persons with whom it may keep in close contact by mail, wire or telephone to ascertain the views of the Producer in regard to contracts being negotiated by the Selling Agent, and that the Producer will accept any contracts negotiated under [fol. 152] its authority given by personal conference or in communication by telephone, telegraph or mail.

Twelfth. The books of the parties hereto, so far as they have to do with the subject of this Agreement, shall, at all reasonable times, be open to the inspection of the other party; and the Selling Agent is hereby expressly authorized to call upon any Railway Company over whose lines shipments have been made by the Producer for any and all information pertaining to any such shipments.

Thirteenth. Not later than the 25th day of each calendar month the Selling Agent shall furnish to the Producer a complete report of all coal of the Producer and the total

of all other producers who shall have entered into substantially identical or similar agreements with the Selling Agent, showing for the preceding month the classes, quantities and grades of coal sold and the average prices received for each.

Fourteenth. In the event that any controversy shall arise at any time between the parties hereto with respect to any matter or question arising under or by virtue of this agreement, which they are unable to adjust or settle, the controversy shall be referred for settlement to a board of arbitration composed of three disinterested and competent persons versed in the coal trade, one of whom shall be chosen by the Producer, one by the Selling Agent, and the third by the two so selected, and its findings and decision shall be binding upon both parties. The provisions of this Agreement relating to arbitration shall be governed by and construed in accordance with The United States Arbitration Act and all amendments thereto.

Fifteenth. The Producer may at any time designate any one person, firm or corporation to act as a Sub-agent of the Selling Agent, to sell the coal of the Producer, and said Sub-agent may sell other coal which the Selling Agent has for sale, unless the Producer specifically limits the Sub-agent to the selling of coal produced by it, subject to all the [fol. 153] terms and conditions of this Agreement and on the terms and conditions contained in the form of Sub-agents' agreement annexed hereto and marked "Schedule B," upon furnishing to the Selling Agent proof that the Sub-agent is financially responsible and able to meet the obligations to be assumed by it.

In case such limited Sub-agent makes sales contracts for coal during periods of market shortages, under the conditions set out in paragraph "Fourth" hereof, in excess of the pro rata share of the Producer so designating such Sub-agent in the total sales of the Selling Agent, the Selling Agent shall have the right to offer to other producers of like character of coal the said excess tonnage, and the Sub-agent shall be entitled to its commissions on said excess from the Producer accepting the orders therefor.

The Selling Agent shall be responsible for the acts of its Sub-agents in the same manner as it is responsible for its own acts, except as hereinafter provided.

Sixteenth. The Selling Agent guarantees payment of all accounts and is hereby granted full authority to collect for all coal sold by it under this Agreement, and, for the purpose of enforcing such collection, to bring suit therefor in its own name; provided, however, that the Selling Agent shall not be liable to the Producer for the acts or omission of any Sub-agent designated by the Producer.

Seventeenth. It is the intent of this Agreement to provide for an orderly and business-like method of selling the coal of the Producer by the Selling Agent hereinbefore appointed the Producer's exclusive selling agent, and it is therefore agreed that the Producer shall not produce, sell or ship any coal except upon the order and at the direction of the Selling Agent; and in the event the Producer shall, in violation of the terms of this Agreement, produce, sell or ship coal except as herein provided, or fail or refuse to ship coal as directed by the Selling Agent, the Producer shall pay to the Selling Agent, first, the amount to which the Selling Agent would have been entitled on account of [fol. 154] any such shipments so made or so refused and, second, all other damages which the Selling Agent may suffer on account of such violation of this contract by the Producer.

Eighteenth. Attached hereto and marked "Schedule C" is a list of Producers operating in the States of —— and —— in the producing territory generally known as the —— district, showing the average yearly production of each producer during the past ten years. This Agreement shall become effective when substantially similar exclusive agency agreements are signed by producers representing — per cent of the tonnage shown on "Schedule C" hereto attached, and the Selling Agent shall have notified the Producer of that fact.

Nineteenth. This Agreement shall continue in force for a period of ten years after the date on which this agreement shall become effective, and at the expiration of such period shall continue thereafter for periods from year to year unless and until either party hereto shall elect to terminate this agreement by giving to the other party six months' notice thereof. Upon receipt of such notice the Selling Agent shall promptly notify all producers with whom it has

entered into substantially identical or similar agency agreements, and within ten days from the receipt by the Producers of any such notices the producers may serve notice of termination to take effect on the same date.

Twentieth. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

In witness whereof the respective parties hereto have caused this Agreement to be executed by their proper officers thereunto duly authorized, the day and year first above written.

—— ——.
—— ——.

[fol. 155] EXHIBIT B

Contract Form to be Entered into Between Proposed District or Regional Sales Agencies and Their Sub-agents

Agreement, made this — day of ——, 193-, between B, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Selling Agent," and C, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Sub-Agent," witnesseth:

Whereas, pursuant to an Agreement dated the — day of ——, 193-, by and between the Selling Agent and A, a corporation organized and existing under and by virtue of the laws of the State of ——, hereinafter called the "Producer," a copy of which Agreement is hereto attached and made a part hereof, the Selling Agent has agreed to act as the exclusive selling agent of the Producer for the sale of coal produced by it in its mines located in the States of —— and ——; and

Whereas, it is provided in said Agreement that the Producer may at any time designate a sub-agent of the Selling Agent subject to all the terms and conditions of the agreement; and

[fol. 156] Whereas, the Producer has designated C as its sub-agent pursuant to the terms and conditions of said agreement; and

Whereas, the Sub-Agent is engaged in the sale and distribution of coal and is willing to act as Sub-Agent of the

Selling Agent on the terms and conditions hereinafter contained,

Now, therefore, in consideration of the premises and of the mutual covenants hereinafter contained, the parties hereto covenant and agree as follows:

First. The Selling Agent hereby appoints the Sub-Agent as its sub-agent for the sale of the coal of the Producer and such other coal or other producers as the Selling Agent may from time to time designate, and the Sub-Agent hereby accepts such appointment on all the terms and conditions contained in this Agreement.

Second. The Sub-Agent agrees to use its best efforts to sell such coal as it is authorized to sell hereunder in such amounts and in accordance with such classifications as the Selling Agent may designate and upon such terms and conditions and at not less than the price or prices established by the Selling Agent from time to time; and the Sub-Agent shall not depart from the amounts, classifications, terms and conditions or sell at prices less than those so established by the Selling Agent without the prior written authorization of the Selling Agent.

Third. The Sub-Agent shall not have authority to make allowances and adjustments on account of any complaint of any purchaser resulting from causes within the control of the Producer or the Selling Agent, except under the direction and subject to the approval of the Selling Agent. Any such allowance and adjustment so approved by the Selling Agent shall be deducted from the amount to be remitted by the Sub-Agent to the Selling Agent in accordance with the terms of this Agreement.

Fourth. The Sub-Agent shall have authority to make allowances and adjustments with purchasers on account of [fol. 157] any complaint of any purchaser resulting from causes within the control of the Sub-Agent and the amount of any commission due to the Sub-Agent from the Selling Agent under the provisions of paragraph "Sixth" of this Agreement shall be reduced by the amount of any such allowance and adjustment, and the Sub-Agent further agrees to hold the Selling Agent harmless from any damage or liability occasioned by any act or omission of the Sub-Agent; provided, however, that anything herein con-

tained to the contrary notwithstanding, the Sub-Agent shall in no wise be responsible for any loss or damage occasioned by any act or omission on the part of the Selling Agent or the Producer in respect of any coal sold in accordance with the provisions of this Agreement.

Fifth. The Sub-Agent guarantees the payment of all accounts and shall collect all sums due and owing to it for the account of the Selling Agent for all coal sold by the Sub-Agent under this Agreement, and, for the purpose of enforcing such collection, full and complete authority is hereby granted to the Sub-Agent to bring suit therefor in its own name.

Sixth. The Selling Agent agrees to pay to the Sub-Agent a commission of — per cent of the selling price, f.o.b. at the mines, on coal shipped pursuant to the terms of this Agreement and the Sub-Agent is hereby authorized to deduct this commission before making the payment to the Selling Agent as in paragraph "Seventh" provided.

Seventh. On the 20th day of each calendar month, the Sub-Agent shall account and pay to the Selling Agent the full purchase price of all coal sold by the Sub-Agent under this Agreement for the account of the Selling Agent, for which payment has not theretofore been made and on which railroad weights have been received by the Sub-Agent prior to the 10th day of that month, less any and all commissions and/or deductions authorized under this Agreement.

Eighth. All sales shall be made by the Sub-Agent for the account of the Selling Agent, but shall be invoiced to the purchaser in the name of the Sub-Agent, as agent of the [fol. 158] Selling Agent, and payment shall be made to the Sub-Agent by the purchaser. A copy of each such invoice shall be sent to the Selling Agent and the Producer or Producers at the time it is sent to the purchaser.

Ninth. In the event that any controversy shall arise at any time between the parties hereto with respect to any matter or question arising under or by virtue of this Agreement, which they are unable to adjust or settle, the controversy shall be referred for settlement to a board of arbitration composed of three disinterested and competent persons experienced in the coal trade, one of whom shall be chosen

by the Selling Agent, one by the Sub-Agent, and the third by the two so selected, and their findings and decision shall be binding upon both parties. The provisions of this Agreement, relating to arbitration, shall be governed by and construed in accordance with The United States Arbitration Act and all amendments thereto.

Tenth. This Agreement shall continue in force for a period of ten years from the date hereof and at the expiration of such period shall continue thereafter for periods from year to year, unless and until either party hereto shall elect to terminate this Agreement by giving to the other party six months' written notice thereof; provided, however, that anything herein contained to the contrary notwithstanding, this Agreement shall cease and determine upon the termination for any reason of the Agreement made the — day of ——, 193-, by and between the Producer and the Selling Agent.

In witness whereof, the respective parties hereto have this day caused this Agreement to be executed by their proper officers thereunto duly authorized, the day and year first above written.

— —
— —

[fol. 159] List of the Committees Appointed by Chairman Bradley for the Various Districts

(In each case the first name is that of the Chairman)

Harlan District (Kentucky)

R. C. Tway, President, R. C. Tway Coal Co., Inter-Southern Bldg., Louisville, Ky.
D. B. Cornett, President, Cornett-Lewis Coal Co., Starks Bldg., Louisville, Ky.
W. J. Cunningham, President, Crummies Creek Coal Co., Crummies, Ky.
S. J. Dickenson, Mary Helen Coal Corp., Coalgood, Ky.
B. W. Whitfield, President, Harlan Collieries Co., Brookside, Ky.

Hazard District (Kentucky)

Irvin Davis, President, Hatfield-Campbell Creek Coal Co., Union Trust Bldg., Cincinnati, O.

Jas. Bonnyman, President, Blue Diamond Coal Co., Dixie Terminal Bldg., Cincinnati, O.
J. H. Bowling, President, Crawford Coal Corp., City Natl. Bk. Bldg., Lexington, Ky.
W. E. Davis, President, Davis Collieries Co., Lexington, Ky.
John P. Gorman, President, John P. Gorman Coal Co., Fayette Natl. Bk. Bldg., Lexington, Ky.

Southern Appalachian District
(Tennessee and Kentucky)

J. E. Butler, General Manager, Stearns Coal & Lbr. Co., Stearns, Ky.
E. C. Mahan, President, Southern Coal & Coke Co., Holston Natl. Bk. Bldg., Knoxville, Tenn.
Chas. M. Moore, President, Moore Coal Co., Holston Natl. Bk. Bldg., Knoxville, Tenn.

West Kentucky

C. F. Richardson, President, West Kentucky Coal Co., Sturgis, Ky.
Brent Hart, President, Hart Coal Corp., Mortons Gap, Ky.
Monro B. Lanier, President, Monro-Warrior Coal & Coke Co., Comer Bldg., Birmingham, Ala.
C. M. Martin, President, Greenville Coal Co., Greenville, Ky.

[fol. 160] Big Sandy District (Kentucky)

A. DW. Smith, President, North-East Coal Co., Lewis Tower, Philadelphia, Pa.
J. Noble Snider, Vice-President, Consolidation Coal Co., 15 Broad St., New York City.
C. W. Watson, Elk Horn Coal Corporation, Fleming, Ky.

Indiana

Homer B. Talley, President, Coal Bluff Mining Co., Terre Haute Trust Bldg., Terre Haute, Ind.
George A. Enos, President, Enos Coal Mng. Co., 1207-308 Euclid Ave. Bldg., Cleveland, O.
H. M. Ferguson, President, Ferguson Coal Co., Clinton, Ind.

David Ingle, President, Ingle Coal Co., 810 First St., Evansville, Ind.
R. H. Sherwood, President, Central Indiana Coal Co., Merchants Bk. Bldg., Indianapolis, Ind.

Alabama

M. W. Bush, President, Alabama By-Products Corp., Webb Crawford Bldg., Birmingham, Ala.
A. B. Aldridge, President, Southeastern Fuel Co., Ala. Power Bldg., Birmingham, Ala.
C. S. Bissell, President, Black Diamond Coal Mng. Co., Comer Bldg., Birmingham, Ala.
H. M. Brooks, Vice-President, Alabama Fuel & Iron Co., Pioneer Bldg., Birmingham, Ala.
H. T. DeBardeleben, President, DeBardeleben Coal Corp., Sou. Ry. Bldg., Birmingham, Ala.
D. A. Thomas, President, Montevallo Coal Mng. Co., Webb Crawford Bldg., Birmingham, Ala.
S. L. Yerkes, President, Grider Coal Sales Agency, Webb Crawford Bldg., Birmingham, Ala.

West Virginia Smokeless District

T. B. Davis, President, Island Creek Coal Co., 26 Broadway, New York City.
O. L. Alexander, Vice-President, Pocahontas Fuel Co., 1 Broadway, New York City.
C. E. Dunlap, President, Berwind-White Coal. Mng. Co., 1 Broadway, New York City.
R. H. Gross, President, New River Co., 85 Devonshire St., Boston, Mass.
R. H. Knode, President, Stonega Coke & Coal Co., 123 S. Broad St., Philadelphia, Pa.
J. P. Williams, Jr., President, Koppers Coal Co., Koppers Bldg., Pittsburgh, Pa.

Kanawha District (West Virginia)

C. A. Cabell, President, Carbon Fuel Co., Charleston, W. Va.
Wm. J. Clothier, President, Boone County Coal Corp., 1335 S. Fourth St., Philadelphia, Pa.
[fol. 161] Irvin Davis, President, Hatfield-Campbell Creek Coal Co., Un. Trust Bldg., Cincinnati, O.

C. C. Dickinson, President, Dickinson Fuel Co., Kanawha Valley Bank Bldg., Charleston, W. Va.
C. R. Moriarty, President, Cabin Creek Consolidated Coal Co., Carew Tower, Cincinnati, O.
L. M. Webb, President, Webb Coal Mining Co., 1st Natl. Bank Bldg., Cincinnati, O.

Logan (West Virginia)

J. D. Francis, Vice-President, Island Creek Coal Co., Huntington, W. Va.
John C. Cosgrove, President, West Virginia Coal & Coke Co., Johnstown, Pa.
H. E. Jones, President, Logan County Coal Corp., Box 1218, Charleston, W. Va.

Williamson (West Virginia and Kentucky)

W. M. Ritter, former Chairman, Red Jacket Consolidated Coal & Coke Co., 2223 Massachusetts Ave., Washington, D. C.
G. S. Patterson, Sycamore Coal Co., Box 1324, Huntington, W. Va.
W. A. Richards, President, Majestic Collieries Co., Bluefield, W. Va.
E. M. Tierney, Sharon Coal & Coke Co., 2815 Woodland Drive, Washington, D. C.

Northern West Virginia

C. H. Jenkins, Vice-President, Hutchinson Coal Co., Fairmont, W. Va.
H. L. Findlay, President, Simpson Creek Collieries Co., Hanna Bldg., Cleveland, O.
Robt. C. Hill, Chairman of Board, Consolidation Coal Co. 15 Broad St., New York City.
John M. Jamison, President, Jamison Coal & Coke Co., Greensburg, Pa.
Edward Page, President, New England Coal & Coke Co., 250 Stuart St., Boston, Mass.
E. H. Reppert, President, Reppert Coal Co., Flemington, W. Va.

Southwest Virginia

D. D. Hull, Jr., Vice-President, Virginia Iron, Coal & Coke Co., Roanoke, Va.

C. E. Bockus, President, Clinchfield Coal Corp., 75 West St., New York City.
R. S. Graham, Vice-President, Wise Coal & Coke Co., Norton, Va.
Calvin Holmes, President, Holmes-Darst Coal Co., Dixie Terminal Bldg., Cincinnati, O.
Ario Pardee, President, Blackwood Coal & Coke Co., 1600 Walnut St., Philadelphia, Pa.
R. E. Taggart, Vice-President, Stonega Coke & Coal Co., 123 S. Broad St., Philadelphia, Pa.

Ohio (Entire State, Embracing Five Districts)

H. L. Findlay, Vice-President, Youghiogheny & Ohio Coal Co., Hanna Bldg., Cleveland, O.
F. W. Braggins, President, Lorain Coal & Dock Co., 33 N. High St., Columbus, O.
[fol. 162] C. H. Bromley, Sales Manager, United States Coal Co., 1276 W. 3rd St., Cleveland, O.
Wm. Collins, President, Hanna Coal Co., Leader Bldg., Cleveland, O.
Wm. Emery, Jr., President, Cambridge Collieries Co., Rockefeller Bldg., Cleveland, O.
Fred Essex, Secretary, Essex Coal Co., 16 E. Broad St., Columbus, O.
Geo. M. Jones, President, Ohio Collieries Co., Toledo, Ohio.
J. C. Nelms, General Manager, Ohio & Pennsylvania Coal Co., Union Trust Bldg., Cleveland, O.
Geo. K. Smith, President, Sunday Creek Coal Co., Outlook Bldg., Columbus, O.
John A. Teegarden, Vice-President, New York Coal Co., Columbus, O.
Whitney Warner, Vice-President, Warner Collieries Co., Union Trust Bldg., Cleveland, O.

Illinois

D. W. Buchanan, President, Old Ben Coal Corp., 230 S. Clark St., Chicago, Ill.
Geo. B. Harrington, President, Chicago, Wilmington & Franklin Coal Co., McCormick Bldg., Chicago, Ill.
W. J. Jenkins, President, Consolidated Coal Co. of St. Louis, Ry. Exch. Bldg., St. Louis, Mo.

W. K. Kavanaugh, President, Southern Coal, Coke & Mng. Co., 319 N. Fourth St., St. Louis, Mo.
Rice Miller, Vice-President, Hillsboro Coal Co., Hillsboro, Ill.
T. C. Mullins, President, Northern Illinois Coal Corp., Straus Bldg., Chicago, Ill.
Geo. W. Reed, Vice-President, Peabody Coal Co., 20 N. Wacker Drive, Chicago, Ill.
F. H. Woods, President, O'Gara Coal Co., McCormick Bldg., Chicago, Ill.

Freeport Thick Vein District (Penna.)

Geo. H. Love, Assistant to President, Union Collieries Co., Oliver Bldg., Pittsburgh, Pa.
J. B. Ford, President, Ford Collieries Co., Ford Bldg., Detroit, Mich.
C. F. Hosford, Jr., President, Butler Consolidated Coal Co., Butler, Pa.

Western Pennsylvania

J. D. A. Morrow, President, Pittsburgh Coal Co., Oliver Bldg., Pittsburgh, Pa.
H. F. Bovard, President, Keystone Coal & Coke Co., Greensburg, Pa.
H. L. Findlay, Vice-President, Youghiogheny & Ohio Coal Co., Hanna Bldg., Cleveland, O.
W. M. Henderson, President, Henderson Coal Co., Union Bank Bldg., Pittsburgh, Pa.
Ralph Jamison, Vice-President, Jamison Coal & Coke Co., Greensburg, Pa.
E. B. Leisenring, President, Westmoreland Coal Co., 123 S. Broad St., Philadelphia, Pa.
F. B. Lockhart, Vice-President, Hillman Coal & Coke Co., 1st Natl. Bk. Bldg., Pittsburgh, Pa.
[fol. 163] M. W. McClane, President, McClane Mining Co., Farmers Bk. Bldg., Pittsburgh, Pa.
Scott Stewart, President, W. J. Rainey, Inc., 52 Vanderbilt Ave., New York City.
J. T. M. Stoneroad, President, Carnegie Coal Corp., Oliver Bldg., Pittsburgh, Pa.
F. E. Taplin, President, North American Coal Corp., Union Trust Bldg., Cleveland, O.

Central Pennsylvania

B. M. Clark, President, Rochester & Pittsburgh Coal Co., Indiana, Pa.

L. G. Ball, President, Heisley Coal Co., 260 S. Broad St., Philadelphia, Pa.

G. Dawson Coleman, President, Ebensburg Coal Co., 123 S. Broad St., Philadelphia, Pa.

J. F. Macklin, President, Monroe Coal Mng. Co., 260 S. Broad St., Philadelphia, Pa.

L. C. Madeira, III, Asst. to President, Madeira, Hill & Co., 260 S. Broad St., Philadelphia, Pa.

W. A. Marshall, President, W. A. Marshall & Co., 17 Battery Place, New York City.

Chas. O'Neill, Vice-President, Peale, Peacock & Kerr, Inc.. Graybar Bldg., New York City.

C. A. Owen, President, Imperial Coal Corp., 295 Madison Ave., New York City.

J. W. Searles, President, Pennsylvania Coal & Coke Corp., 17 Battery Place, New York City.

H. C. Voorhees, Vice-President, Madeira, Hill & Co., 260 S. Broad St., Philadelphia, Pa.

Colorado and New Mexico

Douglas Millard, Manager of Fuel Sales, Colorado Fuel & Iron Co., Denver, Colo.

H. C. Marchant, President, Pinnacle Kemmerer Fuel Co., 401 Boston Bldg., Denver, Colo.

B. W. Snodgrass, President, Victor-American Fuel Co., Denver, Colo.

Utah

John B. Marks, General Manager, Independent Coal & Coke Co., Walker Bldg., Salt Lake City, Utah.

Otto Herres, Assistant Manager, United States Fuel Co., Newhouse Bldg., Salt Lake City, Utah.

L. R. Weber, General Manager, Liberty Fuel Co., Kearns Bldg., Salt Lake City, Utah.

Washington

N. D. Moore, President, Pacific Coast Coal Co., Smith Tower, Seattle, Wash.

E. P. Lucas, President, Bellingham Coal Mines, Seaboard Bldg., Seattle, Wash.

[fol. 164] Montana

Forrest Richardson, Vice-President Charge Sales, Roundup Coal Mng. Co., W. O. W. Bldg., Omaha, Nebr.
F. W. C. Whyte, General Manager, Coal Dept., Anaconda Copper Mng. Co., Anaconda, Mont.

Southern Wyoming

T. J. O'Brien, Vice-President, Gunn-Quealy Coal Co., Boston Bldg., Salt Lake City, Utah.
L. T. Dee, Lion Coal Co., 1st Natl. Bk. Bldg., Ogden, Utah.

Northern Wyoming

Michael Gallagher, President, Sheridan-Wyoming Coal Co., Terminal Tower, Cleveland, O.
R. J. Ireland, President, Owl Creek Coal Co., Amityville, N. Y.

Southwest District

(Kansas, Missouri, Arkansas and Oklahoma)

Ira Clemens, President, Commercial Fuel Co., Pittsburg, Kan.
J. R. Crowe, President, Crowe Coal Co., Dwight Bldg., Kansas City, Mo.
Grant Stauffer, President, Majestic Coal Mining Co., 1012 Baltimore Ave., Kansas City, Mo.

[fol. 165] List of Those Present at the December 3d Conference

J. G. Bradley (Chairman), President, Elk River Coal & Lumber Co., Dundon, W. Va.
L. G. Ball, President, Heisley Coal Co., Philadelphia, Pa.
C. E. Bockus, President, Clinchfield Coal Corp., New York City.
Wm. G. Caperton, Vice-President, Scotia Coal & Coke Co., Charleston, W. Va.
W. Gaston Caperton, President, Slab Fork Coal Co., Slab Fork, W. Va.
B. M. Clark, President, Rochester & Pittsburgh Coal Co., Indiana, Pa.
Heath S. Clark, Vice-President, Rochester & Pittsburgh Coal Co., Indiana, Pa.

G. Dawson Coleman, President, Ebensburg Coal Co., Philadelphia, Pa.
A. H. Crane, Treasurer, West Virginia Coal & Coke Corp., Cincinnati, O.
W. H. Cunningham, Executive Vice-President, Binkley Coal Co., Chicago, Ill.
W. J. Cunningham, President, Crummies Creek Coal Co., Crummies, Ky.
T. B. Davis, President, Island Creek Coal Co., New York City.
C. C. Dickinson, President, Dickinson Fuel Co., Charleston, W. Va.
Wm. Emery, Jr., President, Cambridge Collieries Co., Cleveland, O.
H. L. Findlay, Vice-President, Youghiogheny & Ohio Coal Co., Cleveland, O.
J. D. Francis, Vice-President, Island Creek Coal Co., Huntington, W. Va.
Harry L. Gandy, President, Pittston Coal, Inc., New York City.
M. L. Garvey, President, Fire Creek New River Coal Co., Charleston, W. Va.
E. L. Greever, Attorney, Tazewell, Va.
Geo. C. Grolock, Eastern Manager, Hutchinson Coal Co., Philadelphia, Pa.
R. H. Gross, President, New River Co., Boston, Mass.
Geo. B. Harrington, President, Chicago, Wilmington & Franklin Coal Co., Chicago, Ill.
H. R. Hawthorne, Secretary and General Counsel, Pocahontas Fuel Co., Inc., New York City.
F. E. Herriman, President, Clearfield Bituminous Coal Corp., New York City.
S. C. Higgins, Secretary, New River Coal Opers. Assn., Mt. Hope, W. Va.
Gory Hogg, President, Clear Creek Coal Co., Lewisburg, W. Va.
Calvin Holmes, President, Holmes-Darst Coal Co., Cincinnati, O.
H. E. Howard, President, Pyramid Coal Corp., Chicago, Ill.
D. D. Hull, Jr., Vice-President, Virginia Iron, Coal & Coke Co., Roanoke, Va.

C. B. Huntress, Executive Secretary, National Coal Association, Washington, D. C.
R. L. Ireland, Jr., Vice-President, Hanna Coal Co., Cleveland, O.
C. H. Jenkins, Vice-President, Hutchinson Coal Co., Fairmont, W. Va.
Geo. M. Jones, North American Coal Corp., Haverford, Pa.
[fol. 166] James Ellwood Jones, Vice-President, Pocahontas Fuel Co., Inc., Switchback, W. Va.
D. C. Kennedy, Vice-President, Imperial Smokeless Coal Co., Charleston, W. Va.
W. R. Kernohan, General Manager, Pocahontas Coal Sales Co., Cincinnati, O.
R. H. Knode, President, Stonega Coke & Coal Co., Philadelphia, Pa.
W. E. E. Koepler, Secretary, Pocahontas Operators Association, Bluefield, W. Va.
E. B. Leisenring, President, Westmoreland Coal Co., Philadelphia, Pa.
J. J. Lincoln, Vice-President, Crozer Coal & Coke Co., Elkhorn, W. Va.
Geo. H. Love, Assistant to President, Union Collieries Co., Pittsburgh, Pa.
J. F. Macklin, President, Monroe Coal Mining Co., Philadelphia, Pa.
E. J. McVann, Traffic Manager, Property Owners' Committee, Washington, D. C.
L. C. Madeira, III, Assistant to President, Madeira, Hill & Co., Philadelphia, Pa.
E. C. Mahan, President, Southern Coal & Coke Co., Knoxville, Tenn.
W. A. Marshall, President, Shallmar Mining Corp., New York City.
Rice Miller, Vice-President, Hillsboro Coal Co., Hillsboro, Ill.
E. H. Molthan, Associate Counsel, General Coal Co., Philadelphia, Pa.
J. D. A. Morrow, President, Pittsburgh Coal Co., Pittsburgh, Pa.
Chas. O'Neill, Vice-President, Peale, Peacock & Kerr, Inc., New York City.
J. Van Norman, Norman, Quirk & Graham, Louisville, Ky.
W. D. Ord, President, Empire Coal & Coke Co., Landgraff, W. Va.

Chas. A. Owen, President, Imperial Coal Corp., New York City.
Edward C. Page, President, Crozer Coal & Coke Co., Philadelphia, Pa.
W. A. Richards, President, Majestic Collieries Co., Bluefield, W. Va.
C. F. Richardson, President, West Kentucky Coal Co., Sturgis, Ky.
W. L. Robison, Vice-President, Youghiogheny & Ohio Coal Co., Cleveland, O.
S. A. Scott, Vice-President, New River Co., Macdonald, W. Va.
J. W. Searles, President, Pennsylvania Coal & Coke Corp., New York City.
R. H. Sherwood, President, Central Indiana Coal Co., Indianapolis, Ind.
A. DW. Smith, President, North-East Coal Co., Philadelphia, Pa.
P. M. Snyder, President, C. C. B. Smokeless Coal Co., Mt. Hope, W. Va.
Sheldon Stearns, Vice-President, Bethlehem Fairmont Coal Co., Fairmont, W. Va.
John L. Steinbugler, Secretary and General Counsel, Wm. C. Atwater & Co., New York City.
Arthur B. Stewart, President, Davis Coal & Coke Co., Baltimore, Md.
R. E. Taggart, Vice-President, Stonega Coke & Coal Co., Philadelphia, O.
F. E. Taplin, President, North American Coal Corp., Cleveland, O.
R. C. Tway, President, R. C. Tway Coal Co., Louisville, Ky.
H. C. Voorhees, Vice-President, Madeira, Hill & Co., Philadelphia, Pa.
Morris Williams, Director, North-East Coal Co., Philadelphia, Pa.
J. P. Williams, Jr., President, Koppers Coal Co., Pittsburgh, Pa.
S. L. Yerkes, President, Grider Coal Sales Agency, Birmingham, Ala.

[fol. 167] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXPEDITING CERTIFICATE OF THE ATTORNEY GENERAL OF THE UNITED STATES—Filed July 14, 1932

To the Clerk of said court:

I, William D. Mitchell, Attorney General of the United States, hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the United States against Appalachian Coals, Incorporated, and other defendants named in the petition therein, under the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", Approved July 2, 1890 (26 Stat. 209), and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," Approved February 11, 1903 (32 Stat. 823), as amended by the Act of Congress approved June 25, 1910 (36 Stat. 854) you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges [fol. 168] of the Fourth Circuit, to the end that said case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day before not less than three of the Circuit Judges of said Circuit, as provided in said act of February 11, 1903, as amended.

William D. Mitchell, Attorney General.

Washington, D. C., July 11, 1932.

[fol. 169] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO HEAR CAUSE ON AUGUST 1, 1932, AT ASHEVILLE, N. C.—Filed July 20, 1932

It appearing that the above entitled cause is a suit in equity brought by the United States under the act of Con-

gress approved July 2, 1890, 26 Stat. 209, and that the Attorney General of the United States has filed a certificate that in his opinion it is a case of general public importance and has requested that the hearing of same be expedited pursuant to the provisions of the act of February 11, 1903 as amended by the act of June 25, 1910 (15 U. S. C. A. 28); and it further appearing that the parties have consented that the said cause be heard at Asheville, North Carolina, on Monday, August 1, 1932:

Now, therefore, it is ordered that the said cause be heard before the three Circuit Judges of the Fourth Judicial Circuit of the United States, viz., John J. Parker, Elliott Northcott and Morris A. Soper, and that same be set down for hearing at Asheville, N. C., on Monday, August 1, 1932.

This the 18th day of July, 1932.

John J. Parker, Senior Circuit Judge.

[fol. 170] In United States District Court

United States of America, Petitioner,

versus

Appalachian Coals, Incorporated, et al., Defendants

Findings of Fact and Conclusions of Law—Filed October 3, 1932

In the above entitled case heard before the undersigned Circuit Judges of the United States, sitting in the District Court of the United States for the Western District of Virginia, the Court, from the pleadings and exhibits filed and the evidence taken before it, makes the following findings of fact and reaches the following conclusions of law:

[fol. 171] Findings of Fact

Parties

1. The petitioner in this suit is the United States of America, and the defendants are Appalachian Coals, Incorporated, a Delaware corporation, the President, the Vice-President, and the Secretary and Treasurer of that

corporation, and 136 corporations and one individual, who are owners and operators of one or more coal mines. For convenience, the operators are hereinafter usually referred to as the defendants or the defendant-producers (P. 1. D. 1-1).

Appalachian Territory and Defendant Producers

2. The defendant-producers operate bituminous coal mines lying in that part of Eastern Kentucky, Eastern Tennessee, Southwestern Virginia, and Southern West Virginia, known as the Appalachian Region, and comprising the Southern High Volatile Coal Field. Strictly speaking, the Appalachian Region comprises the coal bearing areas stretching from Central and Western Pennsylvania through Eastern Ohio, Western Maryland, West Virginia, Southwestern Virginia, Eastern Kentucky, Eastern Tennessee and Northeastern Alabama; but for convenience, the term, Appalachian territory, in these findings will be used to designate that part of the region in which the mines of the defendant-producers are located. It is composed of eight coal producing districts known as Big Sandy-Elkhorn, Harlan, Hazard, Kanawha, Logan, Southern Appalachian, Southwest Virginia and Williamson. It includes 24 counties as follows: Bell, Floyd, Harlan, Johnson, Letcher, McCreary, Perry, Pike and Whitley, in the State of Kentucky; Anderson, Campbell, Claiborne, Fen- [fol. 172] tress, Grundy, Marion and Morgan in the State of Tennessee; Dickinson, Lee, Russell, and Wise in the State of Virginia; Boone, Kanawha, Logan, and Mingo in the State of West Virginia; and a small amount of adjacent territory lies in the counties of Breathitt, Knott, Martin, and Morgan in the State of Kentucky, the County of Tazewell in the State of Virginia and in the Counties of Fayette, McDowell, Putnam, Raleigh, and Wayne in the State of West Virginia. Coal produced in the Appalachian territory will be hereinafter referred to as Appalachian coal (P. 2; D. 4-5; P. X. 3, Tables I and II). (R. 78, 289, 291.)

3. Each of the 137 defendant-producers is engaged in mining coal and in shipping it in interstate commerce or foreign commerce. Heretofore, each has been independ-

ently engaged in the production, distribution, and sale of coal in competition with each other and with other producers of said coal (P. 3).

Contract Between Appalachian Coals, Inc., and Defendant Producers

4. Each defendant-producer has entered into a uniform contract with Appalachian Coals, Inc., wherein the corporation is designated the Selling Agent and is constituted an exclusive agent for the sale of all coal (except deliveries upon outstanding contracts and coal used in the operation of defendants' mines or sold to defendants' employees) produced at defendants' mine or mines in the Appalachian territory, and each defendant-producer agrees not to dispose of, sell, or ship any of the coal except upon the order or at the direction of the Selling Agent. The [fol. 173] corporation agrees to establish a standard classification for all the coal which it sells as agent based upon the suitability of the coal for particular purposes and with due regard to the chemical analysis thereof. The corporation agrees "to use its best efforts to sell all the coal produced by the producer at the best possible prices obtainable" and further "to sell all the coal produced by other producers whose coal it sells at the best possible price obtainable, or so much thereof as the market will justify." The contract further provides that "the Selling Agent is hereby authorized by the producer to sell the coal of the producer subject to the conditions hereinafter stated at the best price or prices obtainable under existing competitive conditions and with due regard to the quality, preparation, and classification of the coal to be sold. Provided, however, that the Selling Agent shall make no contracts of sale or sales calling for future deliveries of coal from the mines of the producer after sixty days from the date of such contract or sales without first obtaining the written authorization of the producer thereof."

With regard to the apportionment of sales amongst the several producers, the contract provides that in the event that the demand for coal is not sufficient to operate the mines of all the producers upon a full-time basis, then as nearly as conditions will permit the Selling Agent will give each producer's mine or mines producing the same

or interchangeable grades of coal as nearly its pro-rata part of available orders as is reasonably possible. The pro rata basis for determining the allocation of orders is based in general upon that percentage of the total sales [fol. 174] made by the Selling Agent that the total car allotment of each producer bears to the total car allotment of all producers whose coal is sold by the Selling Agent. It is expressly stated "that it is the purpose of this and all similar agreements that the Selling Agent will, over each annual period, as nearly as conditions will permit, all factors considered, give each producer's mine or mines producing the same or interchangeable grades of coal as nearly its pro rata part of available orders as is reasonably possible." The producer agrees to pay the Selling Agent a commission of ten per cent of the gross selling price f. o. b. at the mines. The Selling Agent agrees that it will collect the purchase price, guarantee accounts and remit to the producer the purchase price of its coal, less commissions and deductions authorized by the contract. Any controversy growing out of the contract is to be arbitrated. The contract provides that it shall become effective when executed by both parties, and that the producer's coal shall be turned over to the Selling Agent for selling not later than July 1, 1932, or within thirty days after determination of any litigation that may be instituted prior thereto for the purpose of enjoining the Sales Agent's operations thereunder. The agreement is to continue in force until April 1, 1935, and after that date shall continue for periods from year to year unless and until either party shall elect to terminate the agreement by giving to the other party six months' notice thereof. Upon receipt of notice of termination the Selling Agent agrees promptly to notify all other producers with whom it has contracted, and within ten days from the receipt by the producers of such notice they may serve notice of [fol. 175] termination to take effect on the same date (P. 8; D. 1-2; Ex. A, to Answer, pp. 25 to 30).

Sub-agency Contracts

5. Under the contract the producer is given the right to designate one or more persons, firms or corporations to act as the sub-agent of Appalachian Coals, Inc., and that cor-

poration is bound to accept any person, firm or corporation so named as its sub-agent in the business of marketing coal, upon proof of the financial responsibility of the sub-agent. The sub-agency contracts are identical in form. Each provides as follows: "The sub-agent agrees to use its best efforts to sell such coal as it is authorized to sell hereunder in such amounts and in accordance with such classifications as the Selling Agent may designate and upon such terms and conditions and at the price or prices established by the Selling Agent from time to time; and the sub-agent shall not depart from the amounts, classifications, terms and conditions and prices so established by the Selling Agent without the prior authority of the Selling Agent." (See Ex. A, p. 33, par. 2.) In this contract the Selling Agent agrees to pay to the sub-agent a commission of eight per cent of the selling price f. o. b. at the mine (Ex. A, p. 34, par. 6 of the sub-agency contract). The sub-agent agrees that all coals sold by it are to be invoiced in its name as agent for the Selling Agent and that payment therefor is to be made to the sub-agent and remitted by it to the Selling Agent less authorized commissions and deductions and that the sub-agent is to guarantee the payment of all accounts for coal sold by it. The term of the contract is one [fol. 176] year and thereafter for terms of one year until either party shall elect to terminate the contract on three months written notice, or until the termination of the contract between the producer and Appalachian Coals, Inc., or until the cancellation by the producer of the designation of the sub-agent as such, as provided in the agreement between the producer and Appalachian Coals, Inc. (Ex. A, p. 34, par. 10 of the sub-agency contract. P. 9; D. 3-2-3).

6. The reason for giving to each producer the right to designate a sub-agent of Appalachian Coals, Inc., for the sale of the coal produced by the producer was that it would not be possible for Appalachian Coals, Inc., to enter into the market at once with an efficient organization, and also that the present agencies for the sale of coal have long established good will and personal contacts with consumers, and it was felt that it was desirable to maintain this good will and these valuable contacts so as to retain all possible channels for reaching the consuming public (D. 22-5; R. 669-670; 1409-1410).

7. Pursuant to the authority contained in the contracts above mentioned, 43 out of 137 defendant-producers have designated sub-agents of Appalachian Coals, Inc. Practically all other defendant-producers have indicated that they will appoint sub-agents for the sale of their coal. The names of the defendant-producers who have designated [fol. 177] sub-agents and the names of the sub-agents designated are contained in P. X. 3, Table 6 (D. 4-4; P. 9) (R. 783).

Capital Structure of Appalachian Coals, Inc.

8. Appalachian Coals, Inc., has an authorized capital consisting of one thousand shares of common stock of a par value of one dollar each, and nine thousand shares of 7 per cent cumulative preferred stock of a par value of one hundred dollars each. The common stock has exclusive voting power. At the time of the filing of the petition in this case, to-wit, July —, 1932, there were issued and outstanding 439 shares of common stock, all of which was issued at par for cash to the 137 defendant-producers. Said stock was subscribed for and issued upon the basis of one share for each 100,000 tons of coal, or major fraction thereof, of the producers' 1931 production, but in no case less than one share. The defendant-producers have also subscribed at par for 5,206 shares of the corporation's preferred stock upon the basis of one share for each 666⅔ tons, or major fraction thereof, of the subscriber's average monthly production during 1931. Said stock subscriptions have been accepted by the corporation, but at the time of the filing of the petition the purchase price had not been paid and the preferred stock had not been issued. The par value of the common and preferred stock thus issued or subscribed is $520,499.00. Four of the 137 defendant-producers own together more than one-fourth of the outstanding common stock of the corporation, and 17 of the defendant-producers own a majority of said stock. The largest common stockholder is the defendant, Island Creek [fol. 178] Coal Company, which owns 43 shares of common stock. The Vice President of this company is the President of Appalachian Coals, Inc. The remaining unissued common stock of Appalachian Coals, Inc., is being held for, and will be issued only to, other coal producers in Appalachian territory who may later sign a like selling agency

contract with the corporation. Each defendant-producer in subscribing to stock of the corporation gave it the option to repurchase this common stock upon the happening of any one of the following contingencies: (a) if the corporation should cease to be the exclusive selling agency for all coal produced by the stockholder in Appalachian territory; or (b) if the stockholder should cease to produce coal; or (c) should violate any present or future contract with the corporation; or (d) if title to the stock should pass to another (P. 10; D. 1-1, Ex. A, p. 35).

Conditions in the Bituminous Coal Industry Prior to the Formation of Appalachian Coals, Inc.

9. (a) The production and consumption of bituminous coal in the United States from 1880 to 1910 practically doubled each decade (R. 325). In 1880 production was, in round numbers, 43,000,000 tons; in 1890, 111,000,000 tons; in 1900, 212,000,000 tons; and in 1910, 417,000,000 tons. In 1918, during the World War, the peak production for bituminous coal was reached with a production of slightly over 579,000,000 tons. In 1920 production dropped to 568,000,000 tons. From 1921 to 1931, inclusive, the annual figures in millions are as follows:

[fol. 179]

1921	415,000,000 tons
1922	422,000,000 tons
1923	564,000,000 tons
1924	483,000,000 tons
1925	520,000,000 tons
1926	573,000,000 tons
1927	517,000,000 tons
1928	500,000,000 tons
1929	534,000,000 tons
1930	467,000,000 tons
1931	378,000,000 tons

and for the first six months of 1932, according to estimated reports of the Bureau of Mines, 145,000,000 tons (R. 473-474). D. 9-1.

(b) These figures show that up to and including 1915 the growth of the bituminous coal industry had been very rapid

and operators had adopted the rule of thumb that demand for coal would double every ten years (R. 1512). Up to 1915 coal was cheap, freight rates were low, and the user of coal could afford to use it without giving too much thought to the efficient use of it (R. 474). During the years 1916 to 1918 the demand brought on by the World War and car shortages on the railroads (R. 1513) caused a sharp increase in the price of coal. Railroad rates were also advanced. (R. 474). D. 9-2.

(c) There was a material increase in the number and productive capacity of the coal mines during the war and immediately following the war (R. 482). The Fuel Administrator encouraged the development of mines (R. 1514-1515). Railroads were asked by the Fuel Administrator to put in sidetracks and prepare for additional mines (R. 482, [fol. 180] 1203-1205, 1469, 1513). After the fall of 1923 there was no shortage of transportation and there has been none since (R. 275, 1515). The vital matter of transportation shortage, which prior to 1923 had been the chief factor in variations in the price of coal, was removed in that year as an influence on prices. This development of transportation facilities had a marked effect on competition in the coal industry. It brought into active competition in the markets the excess productive capacity at the mines (R. 479, 480). At the present time the excess productive capacity of the bituminous coal mines is very large and is one of the causes of the depressed condition of the industry (R. 281-284, 480-482, 1203-1205, 1469). D. 10-3.

(d) In the year following the Armistice in 1918 there was a drop in general business and the price and production of coal dropped with the demand for it (R. 475). In 1920 there was a general shortage of transportation and labor troubles in a number of producing districts. The price of coal advanced to very high levels because consumers, fearing shortages, bid up the price of coal (R. 475). During the period from 1914 to 1920 the average increase in freight rates was approximately 70 per cent, and some rates were doubled. The base wage rate in the union fields increased during that period 264%, and there was also a tremendous increase in the cost of supplies and machinery used at the mines. These are the principal items that enter into the cost of coal de-

livered to consumers (R. 476-477). In 1922, generally speaking, the consumer of coal was paying almost three times as much for his coal at the mine as he was before the war, and he was paying almost double the transportation charge (R. [fol. 181] 478). This increase in the cost of coal led to the use by large industrial consumers and railroads of efficiency engineers to study the more efficient use of coal. This has continued during the entire period from 1920 to the present time, and is still continuing (R. 478). From 1916 to 1923 it was not a question of being able to sell, but of being able to ship what could be sold, and generally producers of coal became somewhat lax in their sales efforts. There grew up at this time a large number of jobbers, wholesalers and middlemen, who would buy coal for resale and a quick profit (R. 480). People went into the business of middlemen, brokers and wholesalers without any investment at all, simply on their ability to induce producers to sell them a certain amount of coal at certain prices. This resulted in a great increase in the number of distributors of coal (R. 481).

(e) Consumption of coal in all of the industries which are its largest users has shown a substantial relative decline for some years and this is likely to continue for some time. (Defendants' Exhibits 27, 28, 29, 30, 31; R. 1194-1198, 1202, 1203, 1216.) The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due to entirely other causes. (R. 1195.) Coal has been losing ground rapidly for a number of years to substitute fuels as a source of light, heat, and power. It has been losing markets to oil, natural gas, and water power, and has also been losing ground due to greater efficiency in the use of coal. The coal industry in 1916 furnished 72% of the total supply of energy from mineral fuels and water power in the United States. In 1919, this had dropped to 64.6%. [fol. 182] In 1929, it had dropped to approximately 54%. During the same period, from 1919 to 1929, natural gas and oil had increased from 17.9% to 32.1%, and water power from 4.7 to 7.3% (R. 323-324). The increase in the use of coal over the decade from 1920 to 1930 was almost negligible, although the increase in heat, light, energy and power used was rapid (R. 326) (D. 11-5). (Slight absolute increase of coal from 1916-1929, R. 235). These percentages are not strictly accurate because gasoline was ex-

cluded from the competition in 1916 and the entire coal industry was included in that year, but later only the soft coal industry.

(f) The relative proportion of energy used in the United States furnished by coal has been decreasing steadily since 1909, while that furnished by oil, gas and water power has been increasing. This change has become more rapid during the last few years, due to the development of both oil and gas fields. (Defendants' Exhibits 24, 26, 27, 28, 29, 30, 31. R. 1199-1203, 1206-1219, 1229, 1230, 910, 915, 916, 946-948, 957-962.) Based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than two hundred million tons per year. (Defendants' Exhibits 30, 31; R. 1219-1227.) The number of domestic oil burners in use has increased more than sixty-fold (12,500 to 774,500) from 1921 to 1931 (R. 1227). In addition there are 42,500 commercial oil burners in use. About fifty per cent of all oil burners, both domestic and commercial, are in the markets in which Appalachian coals are sold (R. 1227). The railroads have improved combustion methods and reduced their fuel consumption from 1916 to 1929 by 32,000,000 tons. In freight service, their consumption of coal per thousand freight ton miles dropped from 164 pounds in 1919 to 125 pounds in 1929. The electrical industries decreased consumption of coal per kilowatt hour from approximately 3.2 pounds to 1.6 pounds, and thereby reduced their requirements for [fol. 183] coal in excess of 47,000,000 tons. Efficiency in the smelting of pig iron decreased the consumption of coal in relation to the pig iron made by 10,000,000 tons. The saving in by-product coke manufacture over the beehive system amounted to 12,000,000 tons (R. 328-330). (D. 11-6.)

But it must be borne in mind that the use of natural gas and fuel oil is limited to certain areas. Gas is not available to all sections of the country, and the great centers of fuel oil consumption are California, the Southwest, the Mid-Continent field and the Atlantic Seaboard (PX 12 and 13). (R. 115, 118.) Moreover, in the states in which Appa-

lachian coal is chiefly marketed, the substitute fuels combined supply only about 10% of the total energy consumption. In the year 1929 about 50% of defendants' coal, other than railroad fuel, went into the States of Ohio, Michigan, Indiana and Illinois (PX 2, Table 1). The percentage of total energy consumption derived from bituminous coal in 1929 in certain states was as follows: Ohio, 88.7%; Michigan, 89.7%; Indiana and Illinois together, 92.7%; Virginia, 89.5%; Tennessee, 87.9%; Kentucky 82.5%; Georgia, 72.3%; South Carolina, 64.8%; North Carolina 60.4% (PX 8, Table 1). (R. 115, 118, 849, 857, 860, 1015, 1016, 1297.)

Unfavorable Market Conditions Distress Coal

11. The practice of sizing coal has increased rapidly in the last fifteen or eighteen years. Fifteen or eighteen years ago the bulk of the demand was for mine run coal, that is, coal which had been blasted down in the mine, but which had not been separated into different sizes. Today the greater part of the demand is for particular sizes of coal. Coal at the mine is prepared to be shipped by different operators in from one to five or six sizes. The larger percentage of tonnage comes from mines that will ship three or more grades (R. 335). Coal that will go through an inch and three-quarter screen is called nut and slack; that which [fol. 184] will pass thru a screen having holes from one and three-quarter to three inches is designated at many mines as stove coal; that which goes through five or six inch holes is called egg coal, and coal passing over a six inch screen is called lump coal. These sizes vary at the different mines (R. 339). Any one size cannot be prepared without making several sizes. This fact has caused one of the worst practices in the coal industry. When these different sizes of coal are made they are all placed in different railroad cars on the tracks of the producer, and the producer ships daily the sizes for which he has orders. Since the demand for different sizes varies from time to time at different mines, he cannot always find orders for all the different sizes of coal which are in the cars on his tracks, and the tracks may become congested to a point where either production at the mines must be stopped entirely, or the cars must be moved, regardless of demand. This condition results in the practice of shipping unsold coal to billing

points or shipping it on consignment to the producer or his agent, in the consuming territory (R. 336, 1484-1486, 1492). If the coal is not sold by the time it reaches its destination, it is set on a sidetrack by the railroad, and, if not unloaded promptly, goes on demurrage. For the first two days the demurrage is at the rate of $2.00 a day per car. Beginning with the third day, the rate is $5.00, equal to ten cents per ton each day. With coal selling from fifty cents to one dollar and fifty cents per ton for different grades, if the shipper does not dispose of it very quickly, he will not get enough for the coal to pay the demurrage charges. This type of distress coal presses on the market at all times and includes all sizes and grades of coal (R. 335-341). The total distress coal, from all causes, is of substantial quantity. For all railroads east of the Mississippi River, as of July 16, 1932, the total stagnant or no-bill coal amounted to 27,010 cars, equivalent to 1,350,500 tons of coal (R. 891, 892). In addition, the total amount of stagnant coal at tidewater as of August 6, 1932, amounted to 3,681 cars, equivalent to 184,050 tons of coal (R. 893, 1497). (D 11 a, 12, par. 7.)

Usually there are no storage facilities for coal at the mines. When the different sizes of coal are made, they are [fol. 185] placed in railroad cars on the tracks of the producer (R. 335). One of the chief problems of the industry is, therefore, the practice of a larger number of operators of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes.

Some operators do not follow the practice of shipping coal on consignment but limit their production to coal for which they have orders (R. 343). Sizes produced, for which no orders have been secured, must be shipped from the mines in order to keep the tracks clear and must sometimes be disposed of without regard to the cost of production, at distress prices, thereby affecting the general market price for coal. A regional sales agency, being in a position to obtain orders for a large volume of coal, would be able by the allocation of orders to mitigate this situation, and reduce the amount of distress coal on the market, because eventually the demand for the various sizes of coal will absorb the production (R. 343-344). The effect of the shipment of no-bill coal, or coal on consignment, depends upon market

conditions, and it may be sold to advantage. Distress coal is only a fraction of the no-bill coal shipped (R. 1109).

Most industrial consumers buy on a yearly contract. They consume about 80% of the coal, and many large consumers for domestic use also buy on yearly contracts (R. 1441). Purchasers of distress coal ordinarily are those who have storage facilities, and there are not many with such facilities (R. 1318, 1319). Consequently there is little purchased distress coal held in storage, and ordinarily it does not have the effect of depressing the price of coal purchased on contract (R. 1320).

To some extent, the production of sizes for which there are no orders results from a seasonal demand for certain kinds of coal. In the autumn, the increased demand for domestic sizes produces a surplus of some sizes, and the reverse condition exists in the spring (R. 1103). The allocation of orders by a regional sales agency among different producers would not materially alleviate the problem inso- [fol. 186] far as it is seasonal.

The practice of shipping coal no-bill is one that has existed for many years, and has been approved by the Interstate Commerce Commission.

A regional sales agency could not entirely eliminate the difficulties arising from such shipments.

12. Pyramiding of coal is a destructive practice existing in the marketing thereof. It occurs when a producer authorizes several different individuals or agencies to sell the same coal. They in turn may offer the same coal for sale to other dealers with the result that a number of agencies in a particular market offer the same coal to the same purchasers, so that the impression is created that there is more [fol. 187] coal for sale than is the case and the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market (R. 334, 343, 600-602). (D. 13-9.)

13. Organized buying agencies and large consumers purchasing substantial tonnages of coal constitute unfavorable forces bringing about the present condition of the coal industry. The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past (R. 812-813, 815; D. 13-10).

14. Misrepresentation practiced by some producers in selling one size of coal and shipping some other size which they happen to have on hand has an unfavorable effect upon the market. The growth of grades and sizes of coal has been brought about to some extent by the efforts of some producers to persuade consumers that certain sizes of coal will be more efficient in certain types of equipment. The lack of standardization of sizes and the misrepresentation as to sizes have been injurious to the coal industry as a whole (R. 393; D. 13-11).

The evidence, however, does not show the existence of any trade war or widespread fraudulent conduct in the industry.

[fol. 188] 15. Credits and credit losses constitute another factor in the present condition of the industry. There are at the present time no agencies collecting comprehensive data as to the ability and willingness of retailers and wholesalers to pay for their purchases of coal. Producers are forced to take substantial losses because certain dealers buy from one producer until their credit is exhausted, and then buy from other producers until the total credit is greater than would otherwise be the case (R. 394; D. 14-12).

16. Except for periods of strikes or of lack of transportation facilities, the coal business in general has not been considered profitable by mine operators. There was a good market from 1916 to 1923. Since then there has been a downward trend of prices (R. 341-342). Certain companies have made no profits for periods as long as from 1923 to date (R. 1128-1137—939-942; 1378-1379; 1472-1474). (D. 14-13.)

17. Defendants' Exhibit 4 is a table purporting to show the net income or deficit on the federal income taxes of the coal mining industry as shown by unaudited federal income tax returns. The industry's profit or loss, as the case may be, for a particular year is computed by deducting from the net income the federal income taxes; dividends received from domestic corporations and interest received which was not taxable, as for instance, interest on government bonds, are not included in the computation. This table gives the number of companies reporting net income, the number reporting no net income, the amount of net income and deficit, the net income of the industry, the tax, and the

industry's profit or loss for the year. Under the last caption, the result for the years 1917 to 1929 was as follows:

[fol. 189]

Year	Industry	Industry's Profit or Loss
1917	Bit	$132,956,862
1918	Bit	83,082,972
1919	Bit	49,325,270
1920	Bit	173,143,816
1921	Bit	18,329,750
1918	Anth. and Bit	94,313,966
1919	Anth. and Bit	57,692,505
1920	Anth. and Bit	238,925,281
1921	Anth. and Bit	5,086,472*
1922	Anth. and Bit	84,320,930
1923	Anth. and Bit	61,927,331
1924	Anth. and Bit	53,419,006*
1925	Anth. and Bit	27,994,942*
1926	Anth. and Bit	27,067,491
1927	Anth. and Bit	28,067,080*
1928	Bit	27,950,190*
1928	Anth	3,573,311
1929	Bit	15,243,915*
1929	Anth	1,082,444

* Deficit.

This unprofitable condition has existed particularly in the Appalachian territory because these coals are mined in a region where there is very little local consumption, because it is not industrialized. The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi River and North of the Ohio River under an adverse freight rate which imposes an unfavorable differential from 35¢ to 50¢ per ton (R1137, 963; D. 14-13).

The results of the unfavorable condition recited have been that numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the states in which coal producing companies are located have found it increasingly difficult to collect taxes (R. 1282-1283, 1518, 1520, 1524; D. 14-14). [fol. 190] The Government admitted that many defendants had lost money in 1931 and during the first part of 1932 (R695). The published financial reports of 13 companies whose shares are listed on stock exchanges show that, before surplus adjustments and extraordinary items, 8 companies had a profit in 1927, 7 in 1928, 9 in 1929, and 5 in 1930 and 1931; and that the combined profits exceeded the combined losses in 1927, 1928, 1929 and 1930. Island Creek Coal Company, the largest operating in Appalachian

territory (P. X. 3, Tables I and II), had a profit per ton in 1927 of 48.82¢, in 1928 of 53.21¢; in 1929 of 50.72¢; in 1930 of 43.71¢; and in 1931 of 35.12¢. Another defendant company, of moderate size, to wit, Harvey Coal Corporation, had the following mining costs and sales realization per ton; in 1929 cost $1.56, realization $1.62; 1930, cost $1.42, realization $1.46; 1931, cost $1.23, realization $1.16; 1932, first six months, cost $1.36, realization $1.02 (R. 1379; P. 27).

[fol. 191] Efforts to Improve Conditions

18. Because of these conditions, there has been a great deal of discussion among coal operators, State officials and National officials, looking toward the improvement of the industry. The governors of various States discussed the matter with coal producers, and, as a result, Governor Sampson of Kentucky had several meetings with operators from Kentucky and adjoining States (R. 1524-1525, 1406-1407). In October, 1931, Governor Conley of West Virginia called a meeting of operators to meet in Charleston, West Virginia. The concensus of opinion at the meeting was that there was nothing the governors could do in their official capacity to improve the situation; and that another meeting of the principal producers east of the Mississippi River should be called to discuss means of improving conditions (R. 1524-1525). A committee of producers was appointed to confer with C. C. Bockus, President of the National Coal Association, and ask him to call a general meeting of such producers. He did call a general meeting and invited directors of the National Coal Association residing east of the Mississippi River and requested [fol. 192] that they invite producers from their several communities, regardless of whether they were members of the Association (R. 315-319). As a result, a meeting was held in New York City on October 21, 1931, attended by about 100 persons, including coal producers, sales agents, and attorneys. Considerable discussion was had and a number of plans were presented and it was decided that a committee should be appointed to consider all the suggestions that had been made at the meeting or should thereafter be made. A committee was appointed and met the following day and gave consideration to a great number of plans and suggestions. It recommended that consideration be

directed to two plans which seemed to it to offer the most hope in solving the problems of the industry; first, physical consolidations and mergers wherever practical, and second, the formation of regional sales agencies where consolidations and mergers were not practicable (R. 319, 323; D. 15-16; P. 4).

19. A second general meeting of bituminous coal operators was held in New York on December 3, 1931, to which the committee submitted a written report. There was a general discussion of conditions of the industry, the necessity for the demonstration of the advantages of coal as a fuel by effective advertising, engineering research and the economies which might be brought about through sales agencies (R. 395-396). Attention was directed to the fact that sales agencies had played an important part in the distribution of coal during the past sixty years and that during a period of from twenty to twenty-five years a particular agency [fol. 193] had sold substantially the entire output of the Pocahontas coal field on the N. & W. Railroad. At that time there existed other exclusive agencies operated under contracts with producers to sell their entire output, or so much of it as could be sold, in the competitive market. As a rule, these contracts provided that the agency would use its own judgment on spot sales as to prices and quantities sold, but where the sale called for delivery for a period of more than sixty days, it was required that the producer be notified and his consent obtained as to quantity and price (R. 399, 404, 922-923, 652-654, 821-822, 1468, 1377-1378, 1397, 1503, 1505-1511.) (D. 16-17).

Two examples of such sales agency contract were put in evidence as D. X. 41 and D. X. 42, consisting of contract between the Landstreet Downey Coal Company and the General Coal Company for the year 1929, and the Landstreet Downey Coal Company and the North American Coal Corporation for the year 1930 (R. 1617). These were offered by the defendants. The first constituted the General Coal Company an exclusive selling agent for the total production of the mines of the Landstreet Downey Coal Company in Mingo County, West Virginia, except such coal as it might use in the operation of its mine or sell to its employees for their own use. The Landstreet Downey Company reserved the right to determine the prices and terms

of sale of the coal to be sold by the General Coal Company. The General Coal Company agreed not to make any contract for sales on shipments to extend over a period of more than thirty days without the approval of the producer. The producer reserved the right to sell excess production if the General Coal Company should be unable to [fol. 194] furnish sufficient orders at prices satisfactory to the producer to keep the mines running full time. The commission allowed was five per cent of the sales price f. o. b. mine; not less, however, than ten cents per ton. The term of the agreemnt was thirteen months from March 1, 1929. The second agreement mentioned constituted the North American Coal Corporation as an exclusive sales agent for the entire product of the mine for a period commencing April 1, 1930, except coal used in the operation of the mine or sold to the employees. Sales agent agreed to use its best endeavors to secure the highest possible price for coal with the understanding that, subject to the right of the operator to shut down its mine, the sales agent would be permitted to meet reasonable and legitimate competition and would not be unduly restricted as to the price at which it would be permitted to sell the coal, no sales on shipments beyond thirty days were to be made except with the approval of the operator. The operator reserved the right to shut down its mines if the prices secured for the coal were not satisfactory to it. The commission was five per cent on the selling price f. o. b. the mine; but not less than ten cents per ton.

20. It was determined at the second New York meeting that the question should be submitted back to the various districts with the recommendation that they give consideration to the proposals for consolidations or the formation of regional sales agencies (R. 405). It was recognized that the industry could not adopt any method that would be applicable throughout the entire industry, but that differ- [fol. 195] ences in freight rates and labor conditions required that each district should take such action as might be best suited to the local conditions (R. 405. 409-410). It was agreed that the weak place in industry was in the marketing and distribution of the coal in that it was not well advertised and there was no available machinery for economical and intelligent distribution. It was thought

that the coal was generally mined economically (R. 331; D. 16-17).

The report of a special committee of 14 which was unanimously adopted by the general committee is set out in Exhibit B to Answer, pages 4 to 12. It shows that it was the opinion of the committee that under existing conditions the plan of organizing regional sales agencies offers the greatest promise for the immediate betterment of conditions in the bituminous coal industry. The committee felt that it would be a real start on the road to progress towards placing the industry upon a saner and sounder economic business basis. Accordingly, the committee recommended the adoption of sales agencies where mergers of physical properties could not be made; and the committee recommended that a special committee of from three to five members be appointed in each bituminous coal producing district and that these committees present the plan to the operators in their respective districts and procure, if possible, its adoption by them. It was realized that the wishes of the various districts should be observed as to their physical boundaries, and it was thought likely that in many instances certain districts as then designated would unite with other adjoining districts to form larger units (Exhibit B, pages 6-7). Such committees were appointed for the eight pro-
[fol. 196] ducing districts included in the Appalachian territory and for the remaining ten producing districts east of the Mississippi River, namely: Western Pennsylvania, Illinois, West Virginia Smokeless Field; Western Kentucky, Central Pennsylvania, Ohio, Northern West Virginia, Indiana, Alabama, and the Freeport Thick Vein District in Central Pennsylvania (Exhibit B, pages 45-50). It was the purpose of the parties who formulated the plan for an exclusive sales agency for each of the eighteen districts to include in each district territory in which coal was mined and sold under substantially the same competitive conditions. The committee attached in its report the written opinion of counsel upholding the legality of regional selling agents and setting forth a form of contract between selling agents and producers, and a form of contract between selling agents and their sub-agents. The opinion of counsel expressly said that it was assumed that the common selling agency plan would be adopted, it at all, by the entire industry (Exhibit B, page 22).

21. The plan approved at the meeting of December 3, 1931, provided for the incorporation of a marketing company called a selling agent in each bituminous producing district. It provided in general that the producers should subscribe to the stock of the selling agent and should agree to sell their coal exclusively through this agent, which should have exclusive control over the terms, conditions, and prices of sale and should use its best efforts to sell all the coal produced at the best possible prices obtainable. Provision was made for the allocation of orders when the demand was not sufficient to absorb all the output. The contract was to become effective when a certain percentage of producers in a certain district entered into the plan and the contract was to continue in force for a period of ten years (P. 5).

[fol. 197] Immediately after the adjournment of the New York meeting on December 3, 1931, there was held in New York a meeting of the Property Owners Committee consisting of representatives of the producing districts known as Kanawha, Logan, Williamson, Big Sandy-Elkhorn, Hazard, Harlan, Southwest Virginia, and Southern Appalachian districts to consider important pending transportation matters (R. 412, 467, 1527-8). Individuals appointed by the chairman of the New York meeting to carry news of the proposed plan to their respective districts were also present. It was decided to call a general meeting of coal producers for these districts to meet in Cincinnati on December 10, 1931. Notice of this meeting was sent to all coal producers in these districts. In response thereto, two to three hundred persons assembled in Cincinnati. These included coal operators, sales agents, mine owners, local bankers from the coal fields, and also some Cincinnati bankers, and attorneys representing the coal companies. The proceedings of the New York meeting were discussed and a resolution was passed approving, in tentative form, a regional organization covering the districts represented, along the lines suggested at the New York meeting. The resolution requested each district to appoint a committee of three and that several committees should meet together and formulate something that would appeal to the districts; and the joint committee was instructed to call another gen-

eral meeting in Cincinnati to act upon its recommendations. The several district committees met on December 11, 1931, in Cincinnati and considered further the suggestions made at the New York meeting, discussed the practical questions involved, made changes and arranged to send copies of the [fol. 198] modified contracts to all producers for their consideration. The committees fixed December 30, 1931, as the date for the next general meeting of producers. On December 29, 1931, district committees met again to consider suggestions made in the interval so as to make a report on the following day. On December 30, 1931, an open meeting was held in Cincinnati attended by 250 to 300 persons. A resolution was adopted approving the regional sales agency plan as presented to the meeting, and it was decided to secure a charter for Appalachian Coals, Inc., the proposed selling agent. A committee was appointed to prepare and print a pamphlet outlining the purpose of the selling agent, the causes which had brought it about, and the results it was expected to accomplish, so that the persons present at the meeting might have accurate information to take back to the companies which they represented. A charter for Appalachian Coals, Inc., was obtained and the pamphlet which appears in this case as Exhibit A with the answer was prepared. It contained forms (a) of the contract between the producer and the selling agent; (b) the contract between the selling agent and the sub-agent; (c) the subscription agreement for shares of the capital stock of the selling agent; (d) the charter and by-laws of the selling agent. Subsequently, on January 27, 1932, another general meeting was held at Cincinnati and the plan outlined in the pamphlet was approved. It was agreed that the subscription agreement and contract appointing Appalachian Coals, Inc., as exclusive selling agent should not become binding until operators producing, according to 1931 estimates, at least 70% of the coal mined in the Appalachian territory [fol. 199] should execute similar subscription agreements and contracts. Another meeting of producers was held in Cincinnati on March 1, 1932, at which it was reported that producers representing approximately 73% of the 1931 commercial tonnage in the territory had signed contracts, and it was decided that a sufficient tonnage was represented to justify proceeding with the selling agency plan. Consequently, it was agreed that the contracts and subscription

agreements signed should be forthwith delivered and become effective. Twenty-five individuals were recommended by the meeting for election as Directors of the new corporation, and the subscribers in each of the eight producing districts nominated two Directors to serve as regional Directors, and nine others were selected to serve as Directors at large. About the same time the 25 individuals were elected as Directors and they are now serving in that capacity (R. 467-473; Petition, par. 6; Answer, par. 6). (D. 18-20-1; P. 6-7.)

It thus appears that the selling agency committees representing the eight producing districts referred to in these proceedings collectively as Appalachian territory agreed to organize a single selling agency for the eight districts. The Secretary of the National Coal Association opened the meeting in Cincinnati on January 22, 1932, and informed those present that steps had been taken to organize selling agencies in other producing districts. The resolution as to the amount of tonnage provided that a minimum of 70% and a maximum of 80% of the commercial tonnage of the territory should be secured before the plan became effective. A resolution to fix the maximum at 90% was defeated. The [fol. 200] maximum of 80% was adopted because a majority of the producers felt that an organization with a greater degree of control might unduly restrain competition in local markets. The minimum of 70% was adopted because it was agreed that the organization would not be effective without this degree of control (P. 6; R. 705, 713).

[fol. 201] Organization of Selling Agents in Other Districts

24. It was the expectation of the producers who formed Appalachian Coals, Inc., that shortly thereafter similar selling agencies would be organized in other producing districts controlling at least 70% of the bituminous coal respectively produced therein, and that these agencies would be organized in the districts producing coal which is competitive with Appalachian coal, and it was the particular purpose of the defendants in the Appalachian territory to secure such degree of control therein as would eliminate competition among the 73% of the commercial production. However, the formation of Appalachian Coals was not made dependent upon the formation of other regional selling

agencies and there is no evidence of a purpose, understanding or agreement among the defendants that in the event of the formation of other similar regional sales agencies there would be any understanding or agreement, direct or indirect, to divide the market territory between them or to limit production or to fix the price of coal in any market or to cooperate in any way (P. 12, 13; D. 45, 2-3).

The organization of other selling agencies was undertaken after the meeting of December 3, 1931, in a number of producing districts east of the Mississippi River. In January, 1932, the Department of Justice announced that it regarded the selling agency plan as illegal, and shortly thereafter producers outside the Appalachian territory decided to hold their plans in abeyance pending the determination of the question by the courts. Prior to this decision the organization of regional selling agencies had been undertaken as follows (See P-x-1):

[fol. 202] The committee representing operators in the Smokeless Field of West Virginia (known as the Pocahontas, Tug River, New River and Winding Gulf districts) approved in principle the common selling agency plan and appointed a committee to draw up a definite plan of organization for the Northern West Virginia district. The steps taken in Northern West Virginia included the following: The committee drew up such a plan and obtained galley proof of a pamphlet intended for distribution among the operators in that district and containing: (1) a general statement regarding the plan, (2) form of charter of selling agent, (3) form of by-laws, (4) form of stock subscription agreement, (5) form of contract between producers and selling agent, (6) form of contract between selling agent and sub-agents, and (7) form of suggested minutes authorizing execution by producers of contract with selling agent and of subscription to its stock.

The committee representing operators in Western Pennsylvania appointed a sub-committee, which devoted a large amount of time to working out a common selling agency plan and sent a questionnaire to about 75 producers in that district.

A group of operators in Alabama conferred concerning the organization of a common selling agency for producers in that State and designated counsel to prepare an outline along the lines of the plan of organization of Appalachian Coals, Inc.

The Committee in Central Pennsylvania submitted the plan to their counsel, who advised that it was illegal. For this and other reasons no steps were taken to organize a selling agency in that district (P. 12-13).

[fol. 203] Producers in Illinois also decided against the formation of a sales agency in their district (D. 45-1; R. 955-956).

The evidence tends to show that other selling agencies with a control of at least 70 per cent of the production in their respective districts will be organized if the petition in this case is dismissed. The plan appears to have the active support of the leaders in the industry, and it was originally announced as one intended for adoption by the entire industry. On page 22 of Exhibit B, the pamphlet issued as directed by the New York meeting, in the opinion of Col. Donovan it is said: "It is assumed that the plan for a common selling agency will be adopted, if at all, by the entire industry." The expense of employing counsel and distributing the pamphlet was assumed by the National Coal Association (R. 700). The form of the selling agency contract, which has been approved by a majority of the producers in the four different districts differs only in details from that adopted by Appalachian Coals, Inc. (P. X. 1, p. 28).

If other similar agencies are organized, there will result an organization in most of the districts whose coal is or may be competitive with Appalachian coal; but the testimony tends to show that there will still be substantial, active competition in the sale of coal in all markets in which Appalachian coal is sold (R. 1331, 1305, 1308-1322, 368, 375-378, 870-877, 917, 550-555; D. 45-4).

[fol. 204] Competition Between Appalachian and Other Coals. General Markets for Appalachian Coal

27. Coal produced in the Appalachian region is sold in practically all the territory from Maine to Florida and as far west as the Mississippi River, in the South, and as far west as Missouri, Iowa and the Dakotas in the Northwest, and into Canada. These markets may be divided for convenience as follows:

(a) Coal consumed locally with- the Appalachian Region;

(b) Coal going to tidewater for transshipment up Chesapeake Bay and along the coast as far as New Eng-

land and occasionally up into the St. Lawrence River and south to Florida;

(c) Coal shipped all-rail east and south to the District of Columbia, Virginia, North Carolina, South Carolina, and Georgia;

(d) Coal shipped all-rail into Tennessee, Alabama, Mississippi, and Louisiana;

(e) Coal going to the Great Lakes for transshipment to various ports on the Great Lakes and the St. Lawrence River;

(f) Coal shipped into the territory north and west of the Ohio River, which may be subdivided into the four principal consuming areas of Ohio, Michigan, Indiana and Illinois, and coal going to other States (R. 488, 489) (D. 6-2).

[fol. 205] The importance of Appalachian coal in the markets generally is shown by the following statement: In certain markets a large percentage of the total consumption is supplied by Appalachian coal. To some of these markets the freight rate from Appalachian territory is lower than from other producing districts, to some it is equal, and to some it is higher (Def. Ex. 3). In many consuming markets having a lower freight rate from other producing districts than from Appalachian territory, Appalachian coal has a marked competitive advantage over other coal because of its quality, lower cost of production, or established marketing machinery, or a combination of these and other advantages. More than half the bituminous coal consumed in South Carolina, Georgia, Michigan, North Carolina, Kentucky and Tennessee is Appalachian coal (Def. Ex. 1, Table VI). In Ohio, Indiana (other than the Chicago district) and shipments to Lake ports, more coal is furnished by Appalachian territory than by any single other producing district (Ibid.) (P. 14).

[fol. 206] Interchangeability of Coal

28. Coals from Pennsylvania and the Appalachian region can be and are interchanged for use in coking and gas making (R. 1176) (D. 7-5). The use of coal for metallurgical purposes is for the smelting and refining of pig iron and the refinement of other ores. In these industries coal

is used to make coke and the coke in turn is used in the smelting and refining processes. For this purpose, by-product coke ovens are used almost entirely (R. 1274). Of the total number of by-product coke ovens in the markets in which Appalachian coals are sold, 77.6 per cent. used coal from their own captive mines in 1929 (R. 1271, 1272, Defendants' Ex. No. 32). Referring to the allegation in the petition, Paragraph X, page 23, as to the pig iron industry, it is found that Illinois coal and some Indiana coals have been successfully used in coke making, and therefore in the pig iron industry, and substantial tonnages of Illinois coal are now being used for that purpose (R. 1170-1171, 1176, 1269). Coals from Pennsylvania can be used for any purpose for which Appalachian coals can be used, including metallurgical purposes (R. 1184, 1185, 1176, 1178). For steam and all uses, excepting Ohio coals for metallurgical uses, Indiana, Illinois or other coals can be used instead of Appalachian if the cost warrants (R. 1176, 1191, 128, 133, 134, 138, 141, 143, 145-148, 439, 442, 806, 829, 857, 858, 899, 926, 927, 935-937, 999-1001, 1024, 1038, 1039, 1044, 1045, 1047, 1049, 1064, 547, 548, 596-598, 753, 755, 756). A difference in the delivered price of coal of from a few cents to ten cents per ton will cause a change from one coal to another (R. 1182-1184). Referring to the allegation in the petition, Paragraph X, page 23, as to the glass industry, it is found that [fol. 207] for glass making, with the exception of a very small amount (about one-half of one per cent. of the total used for this purpose—R. 1175) any kind of coal can be used, including coal from Indiana, Illinois, or Ohio, and natural gas and producer gas are very extensively used for this purpose (R. 1174-1175). For domestic purposes coals from any field can and are now interchanged with coals from the Appalachian region (R. 1191-1192). High sulphur coal can be, and is, used in gas making, its use depending upon the final cost of making gas, after considering cost of coal plus cost of removing sulphur (R. 1172) (D. 7-5).

However, there are special uses of coal such as in gas making and in the manufacture of coke where only coals with particular characteristics can be employed. In the case of coal used for general industrial purposes certain coals are more desirable than others for particular firing

equipments. Such equipments are often built to consume coal of particular kind of combustion (R. 155, 168, 193, 206, 548). Apart from this, the personal element is a vital factor affecting the interchangeability of different coals. Plant managers, engineers, firemen, and others accustomed to a particular quality of coal, being familiar with its action and effects, are reluctant to use substitutes (R. 1185, 1187). To change from one grade of coal to another in a particular plant causes considerable inconvenience (R. 547, 1187). There is a particularly broad line of demarcation between low volatile or smokeless coal and high volatile coal. The former is less plentiful and is more suitable for domestic purposes because of its greater cleanliness and its ability to hold fire longer (R. 552). It generally sells at a higher [fol. 208] price (R. 504). Appalachian coal is recognized as one of the best high volatile coals (R. 869). It has valuable characteristics and a good reputation in the many markets in which it is sold (R. 158, 190, 869). The difference between high volatile and low volatile coal, and the especial desirability of high volatile coal for certain purposes was brought out by certain witnesses for the government, as follows: M. G. Woodhull of the Federal Glass Company of Columbus, Ohio, a purchaser of coal from the Island Creek Coal Company, (R. 144); George E. Hendrick of the Bryant Paper Company, Kalamazoo, Michigan, a customer of certain defendants in this case, (R. 153); M. E. Geiger of the Westvaco Chlorine Products, Inc., of South Charleston, West Virginia, a customer of certain defendants in the Kanawha territory, (R. 191); Reuben B. Robertson of the Champion Fibre Company of Canton, North Carolina, a customer of certain defendants in the case, (R. 206); George B. Sheppard of the Anderson Gas and Utility Company, Anderson, South Carolina, customer of certain defendants in the Appalachian territory, (R. 209); John Behnke of the Detroit Sulphide Pulp & Paper Company of Detroit, a customer of certain defendants in the case, (R. 228); Charles F. Carter of the National Gas and Heating Company, Nashville, Tennessee, customer of certain defendants in this case, (R. 236); William B. Hitchcock of the Portsmouth Refractories Corporation at Portsmouth, Ohio, customers of certain defendants in the case, (R. 244); Frank Swihart of the Dalton Foundries, Warsaw, Indiana, customers of certain companies producing Appalachian coal

in Eastern Kentucky, (R. 252); Cornelius Youmans Reamer, a dealer in coal in Columbia, South Carolina, customer of certain of the defendants in this case, (R. 261). These witnesses showed that the cost of bituminous coal represented from 10 to 50% of their cost of operation; that their business had been solicited in the past by several different defendants, and that they had been using for some time past only bituminous coal from the Appalachian territory because they found it the most desirable coal for their par- [fol. 209] ticular business after testing coals from other districts. Some of these customers had firing equipment especially designed for the use of high volatile coal (see PB43).

[fol. 210] Amount of Coal Produced by Defendants as Compared with Total Production in Appalachian Region and Total Production East of the Mississippi River

29. The total production of bituminous coal in States east of the Mississippi River, together with the total production of the defendant producers and the total production in the Appalachian Region, together with the percentage of production of the defendant producers and the percentage of production of the Appalachian region for the year 1929, is as follows:

Defendant Tonnage (Gov. Ex. 3, Table 1)	58,011,367	(1)
Outside (non-member) (non-captive) (Gov. Ex. 3, Table II)	20,541,841	(2)
	78,553,208	(3)
Surrounding Territory	12,000,000	(4)
	90,553,208	(5)
Captive Mines (Gov. Ex. 3, Table III)	16,455,001	(6)
Production east of Mississippi River	107,008,209	(7)
Percentage of total production east of Mississippi River represented by defendants' production Lines (1) and (8)	484,786,000	(8)
	11.96	
Percentage of total Appalachian territory production (including captive) represented by defendants' production Lines (1) and (7)		
	54.21	
Percentage of total Appalachian territory production (not cluding captive but including surrounding territory) represented by defendants' production Lines (1) and (5)		
	64.00	
Percentage of total Appalachian territory production (not including captive mines or surrounding territory) represented by defendants' production Lines (1) and (2)		
(See P-X-22.)	74.4	

These figures are taken from P. X. 3, Tables I, II, and III, which show respectively the production in each of the years [fol. 211] 1929, 1930, and 1931 of (a) defendants' mines,

(b) non-defendants' mines, (c) captive mines. The amounts so shown are as follows:

	1929	1930	1931
Defendants' Mines	58,011,367	51,663,395	42,361,771
Non-defendants' Mines	20,541,841	19,926,104	17,882,207
Captive Mines	16,451,001	14,832,929	12,175,461

(See D. 5-1.)

Captive mines are mines owned by consumers of coal in connection with their individual business. The output of these mines is substantially non-competitive with the coal of the defendants. The owners of captive mines do not ordinarily sell a large amount of their coal in competitive markets (R. 642). Some of the companies owning captive mines cannot, under present depressed conditions of industry, absorb the output of their mines and, therefore, offer a part of their production for sale in competitive markets. But these mines have not been purchased for the purpose of selling their output, and future needs of their owners constitute the primary consideration in their operation; and with a return to normal business conditions their output will not be a material factor in the commercial market (P. 26).

P. X 3, Table III, gives a list of captive mines in Appalachian territory and the total production of these mines in the years 1929, 1930, and 1931, has been set out above.

In 1929 the total production was 16,455,001 tons of coal, of which the largest producer was the Fordson Coal Company, producing 2,701,598 tons of coal, it may be assumed primarily, for use by the Ford Motor Company. The next largest producer was the United States Coal and Coke Company which mined 2,491,648 tons, doubtless for its own consumption, primarily.

[fol. 212] It should be noted in this connection that the petition of the Government, paragraph 12, page 28, alleges: that for the three years mentioned the output of the defendants was 72.67 per cent. of the total production of non-captive mines in the Appalachian territory. Paragraph 6 of the petition on pages 12 and 13 alleges that the plan formed at the Cincinnati meeting of January 27, 1932, was not to become effective until operators producing at least 70 per cent. of the coal mined in the Appalachian territory should sign the contract, and that at the meeting held on March 1, 1932, the Secretary reported that producers repre-

senting approximately 73 per cent. of the 1931 commercial tonnage had signed contracts. Paragraph 6 of the answer, on page 16, admits the correctness of these statements; and paragraph 3 of the answer, on page 5, admits that when Appalachian Coals, Inc., shall commence operations it will act as Selling Agent for operators who, according to estimates for the year 1931, produced and marketed approximately 70 per cent. of the total high volatile coal produced in the Appalachian territory. These admissions indicate that in considering competitive conditions in the Appalachian territory the defendants were chiefly concerned with the amount of coal produced by them and other owners of non-captive mines; but the percentages should be qualified, at least, by reference to the product of captive mines and also mines in the surrounding territory (R. 1458, 748).

The coal produced in the surrounding territory is the same kind of coal as that produced in the Appalachian territory and is suitable for the same purposes and available to the same markets, generally on the same freight rates, and for all practical purposes might have been included in [fol. 213] the territory described as Appalachian territory (R. 422, 464-466, 490, 542, 543).

This surrounding territory lies north and west of the Appalachian territory shown on Defendants' Exhibit 9, and also the territory that comes within the circle just on the southeast side. In Tennessee, in the neighborhood of Knoxville and Chattanooga, there is coal produced by operators who are not in Appalachian Coals, Inc. These scattered producers make up the additional tonnage. The operators were invited to the meetings, but there were scattered people around Chattanooga and Knoxville, Tennessee, who thought they had some advantage in the local markets and would be a little better off by not coming in. On the Virginia side, between the Virginia District and the Smokeless District, there are coal producers whose volatile matter is slightly lower than in the high volatile districts, and they thought they would have a little advantage in the markets by staying out of the organization.

On the K. & M. Railroad and the Kanawha River, some producers have river facilities for the shipment of coal on the Ohio which gave them a competitive advantage, and led them to stay out (R. 465-466). The witness Francis said

that the purpose was to combine in each district, under a common selling agency, coal produced under like competitive conditions.

[fol. 214] Competition Between Appalachian Coal and Other Coals in the Several Markets

Consumption of Coal in States in Appalachian Territory

West Virginia

(30) West Virginia consumed in 1929 1,769,014 tons of Appalachian coal (R. 492). This figure should be compared with the total given in D-X-i, Table Vi, which gives a total of 978,769, but this latter total does not include railroad fuel (See D 31-4) (Dx9).

Defendants' Exhibit No. 1, Table 6, shows the distribution of bituminous coal by producing districts and consuming States in 1929. The districts covered by Appalachian Coals, Inc., are separated into five producing districts, and show a total of 107,775,043 tons for the year in question. This total includes 95,100,000 tons produced in the Appalachian territory as designated in this case, and an additional 12,675,000 tons produced in the surrounding territory as described in paragraph 29, p. —, supra. The total of 107,775,043 tons also includes the production of captive mines which amounted in 1929, according to Government's Exhibit 3, Table 3, to 16,445,001. If the production of captive mines is excluded, the defendants produced 74.4% of the total from the Appalachian territory (P X 22). If the production from the surrounding territory is considered, then the production of the defendants is 64.3%, omitting captive mines, and 53.8 including captive mines.

The map, which is Defendants' Exhibit 9, gives a graphic description of some of the same figures.

The figures in Defendants' Exhibit 1, Table 6, do not include railroad fuel.

[fol. 215] See also the calculations in Paragraph 29 supra.

Defendants' Exhibit 2 shows the movement of coal all-rail in tons during the years 1929-1930-1931, with the percentage of the total shipped from various producing fields to the points named. The figures given include railroad fuel and therefore differ from those for the same districts shown in Defendants' Exhibit 1, Table 6, above discussed.

Defendants' Exhibit 2 contains the following heading: "Territory from which Appalachian Coals, Inc., will ship coals." The territory referred to substantially corresponds to the area for which Appalachian Coals, Inc., has agreed to act as selling agent, but does not include any substantial part of the outlying areas or surrounding territory previously mentioned which had a 1929 production of approximately 12,675,000 tons (See P X 22).

West Virginia has very large coal fields, which furnish coal to local consumers as follows:

(a) The low volatile or Smokeless fields, known as Pocahontas, Tug, New River and Winding Gulf Districts. These fields produced 57,500,000 tons in 1929, as compared with 95,100,000 tons produced in Appalachian territory. (See Petition, Par. 2; P. 10 22.) The smokeless coal is generally competitive to Appalachian Coal (Petition P X p. 25).

(b) The central West Virginia field.

(c) Northern West Virginia. This district, including the Fairmont District, produced, according to paragraph 2 of the Petition, on page 7, 28,200,000 tons in 1929.

[fol. 216] (d) Southern West Virginia.—This field is a part of the Appalachian territory, and includes the Kanawha, Logan, and Williamson districts.

The counties of Boone, Kanawha, Logan and Mingo, in the State of West Virginia, are a part of the Appalachian territory (D. 28-1, and R. 492-3) (Petition P. 3, P. 8).

This reference does not indicate the names in the districts of Central West Virginia, nor the kind of coal produced in Central West Virginia, or Northern West Virginia.

All high volatile coal consumed in by-product coke ovens in 1929 in Southern West Virginia, in Kentucky and in Tennessee, was from the fields of Eastern Kentucky, Southern West Virginia, Virginia, or Tennessee (P. 25; P. x 6).

Twenty-two and one-tenth per cent (22.1%) of all the bituminous coal consumed in West Virginia in 1929 came from Appalachian territory (D. x 1, Table VI; D. x 9). The figures on this Table VI of Defendants' Exhibit 1, which refer to the coal produced in the Appalachian districts, include therein the coal from the surrounding territory, making up a total altogether of 107,775,043 tons for the year 1929.

Table VI of Defendants' Exhibit 1, shows that total consumption in West Virginia in 1929 was 4,428,463 tons, which was made up as follows:

Appalachian territory	978,769
Other territories	3,449,694
Total	4,428,463

[fol. 217] Of the latter figure, 1,782,582 came from Western Pennsylvania, and the West Virginia Panhandle; 885,042 from Northern West Virginia, and 682,316 from the Smokeless region.

Kentucky

(31) Kentucky consumed 2,310,442 tons of Appalachian coal in 1929. (See D. 28.) (R. 492-3.) But according to Defendants' Exhibit 1, Table VI, Kentucky consumed 2,782,026 tons of Appalachian coal, which constituted 66.4 per cent of the total consumption in the State.

Kentucky has two coal fields:

(a) Southeastern Kentucky, which is a part of the Appalachian territory.

(b) And the Western Kentucky district, which produces large amounts of coal. It does not appear whether the coal in Western Kentucky is high volatile coal.

Kentucky is supplied in part by the Tennessee mines (R. 492-3).

The Smokeless regions supplied 262,12[illegible] tons in 1929. (See Table VI of Defendants' Exhibit 1.)

[fol. 218] Tennessee

Tennessee consumed in 1929 3,228,950 tons of Appalachian coal which constituted 57.8 per cent of the total consumption. The production of coal, which is available for Tennessee consumers, comes from three fields as follows:

(a) Central and Southeast Tennessee in the Appalachian region;

(b) Western Kentucky and Alabama; and,

(c) A small amount from the Smokeless region. (See P. 25; D. x 9; R. 492-4.) (D. 1—Table 6.)

Virginia

(33) Virginia consumed, in 1929, 4,880,098 tons of coal, of which 1,628,500 tons, or 33.4 per cent of the total came from the Southern Appalachian territory. R. 492 gives 1,677,681 tons. (See D. 28 x 1; Defendants' Exhibit 1, Table VI.)

The other fields from which Virginia drew coal are as follows:

[fol. 219] (a) The smokeless region of West Virginia and Virginia, which together furnish 3,152,284 tons. (See Table VI.) This was the principal source of supply on account of the favorable rate (R. 498).

(b) Other sources of supply were Northern West Virginia, Maryland, and Pennsylvania (R. 418, 492-3).

Virginia itself produced 12,000,000 tons in 1929. Large natural gas lines coming from the gas fields in West Virginia and Kentucky have been built to the principal consuming markets in Virginia within the past two years. Fuel *and* oil has also become an important competitive factor along the Seaboard (R. 499).

In the four States of West Virginia, Kentucky, Tennessee and Virginia there is competition from non-defendant producers. Their production and capacity is in excess of the consumption of coal in these States in 1929. (Petitioner's Exhibit 3, Table II. See R. 24 and 25.)

[fol.220] North Carolina

(34) The consumption of coal in 1929 in this State, as shown by Defendants' Exhibit 1, Table VI, and Defendants' Exhibit 9, was as follows:

Coal from Appalachian Territory	2,197,545 tons
From other districts	1,017,792 tons
Total	3,215,337 tons

This total does not include railroad fuel, but shows that Appalachian coal constituted 68.3 per cent of the total.

The defendant-producers shipped 52.3 per cent of this total (P. x 21).

All the coal, other than the Appalachian, used in North Carolina, according to Table VI of Defendants' Exhibit 1,

constituting 1,017,792 tons, came from the Smokeless region. The percentage of coal coming from the Smokeless region has increased since the year 1929 (D. 31-4).

No coal was produced in North Carolina in 1929 according to Table VI, but the record shows elsewhere there is a very small production in this State (D. 31 x 4; R. 418, 499, 500).

[fol. 221] According to Defendants' Exhibit 2, page 121, the amount of coal consumed in North Carolina, including railroad fuel, (See p. 16) in the year 1929, was as follows:

Coal and Appalachian territory	2,893,046 tons	73.66%
Coal from West Virginia and Virginia	1,034,716 tons	26.34%
From Middle Tennessee	121 tons	.....
Total	3,927,883 tons.	

Of the coal from the Appalachian territory shown in the above table, 1,290,008 tons, or about 45%, came from the Virgina district in the Appalachian territory (DX 2, page 122.) (P. 16).

[fol. 222] Competition in North Carolina

(35) The smokeless field of Virginia and West Virginia is the only present competitor (P. 16; defendants' Exhibit 9; R. 504-5). The freight rates from West Virginia Smokeless Field to Northeastern North Carolina are twenty cents less than from Virginia District.

The freight rates to Central and Southeastern North Carolina are equal to those from Virginia.

The freight rates to Western North Carolina are higher than the lowest rates from the Appalachian territory (See D-31-4. R. 418, 429, 545, 743, 771, and 500.) (— 16).

The freight rates to Asheville and Canton from the smokeless fields of Virginia and West Virginia, are in excess of $1.00 over the freight rates from parts of Appalachian territory (Defendants' Exhibit 3, pages 51 and 57).

Canton consumed 220,263 tons of coal in 1929; all of which came from the Appalachian territory.

Asheville consumed 150,826 tons in the same year, of which 95.48 per cent. came from the Appalachian territory (See Defendants' Exhibit 2, pages 121 and 129).

At present the Appalachian coal has almost a complete monopoly in Western North Carolina.

Even where the freight rates from the smokeless fields are equal or less than the freight rates from the Appalachian territory, coal from the latter has advantage because of this cheaper price (R. 504.) (P. 16).

[fol. 223] There is competition between defendants and non-defendants producing coal in the Appalachian territory (D. 31-4) (R. 521-3, 539).

The Western one-third of North Carolina is a natural market for coal produced in the Virginia and Coal Creek districts, which enjoy a freight rate advantage over other coals from the Southern Appalachian region (D. 31-4; R. 418, 429, and 639).

Substitutes for coal also furnish competition. The total energy consumed by manufacturing industry in North Carolina, in 1929, was derived as follows:

54.4% from bituminous coal;

2.5% from other fuel;

43.1% from water power.

(Petitioner's Exhibit 8, Table II; P. 16.)

Expressing the amount consumed in dollars, manufacturing industries in the State in 1929 used 1,522,436 tons of coal; used energy expressed in dollars of 29.26% in coal, and 66.35% in electric power. The remaining percentages were made up of anthracite, coke, fuel, oils, gasoline, kerosene, manufactured gas, etc. (See D. 31-4, Defendants' Exhibit 11; R. 532).

[fol. 224] It is shown by Petitioner's Exhibit 8, Table I, that in North Carolina, in 1929, coal produced 60.4 per cent of all the energy; other fuels 1.2 per cent and water power 38.4 per cent (P. 16).

There was severe competition in North Carolina between coal on the one hand and hydro-electric power and fuel on the other.

Fuel oil was used principally along the coast. Not much coal is used in North Carolina to produce hydro-electric power. The super power hook-ups make the stand-by steam plant to a large extent unnecessary (D. 30 x 3).

There was no natural gas in North Carolina in 1929 and 1930 (R. 124).

There is competition between defendants and non-defendants for the North Carolina business. The number of defendants competing in North Carolina in 1929 was seventy-seven (Petitioner's Exhibit 2, Table I).

The defendants' 1929 shipments other than railroad fuels in North Carolina were 52.3 per cent of the total shipments of bituminous coal (P. 19, 21).

[fol. 225] South Carolina

(36) The total amount of the consumption of bituminous coal in this state in 1929, exclusive of railroad fuel, is shown by defendants' exhibit 9, and defendants' exhibit 1, table VI (D. 32-5, P. 15).

The consumption was as follows:

Coal from Appalachian territory	2,295,476 tons
From all other territories	104,549 tons
Total	2,400,025

Defendants' table shows that 96 per cent of the coal used was Appalachian coal. The defendant-producers shipped 53.3 per cent of the total (See D. 32 x 5, and P. X 21).

All of the 104,549 tons from other territory, with the exception of 1743 tons, come from the smokeless region.

The total consumption of bituminous coal in South Carolina in 1929, including railroad fuel, was 2,583,453 tons (Defendants' exhibit 2, page 123).

This coal came from the following territories:

Appalachian territory	94.25 per cent
Smokeless fields	3.99 " "
Middle Tennessee	1.68 " "
Alabama	.08 " "
	100.00

[fol. 226] The Virginia district furnished 81 per cent of the Appalachian coal (Defendants' Exhibit 2, page 124).

The defendants controlled eighty-four per cent of the commercial production in the Virginia district (Plaintiff's Exhibit 3, Tables I and II).

There were only two non-defendants in the Virginia district who produced over 200,000 tons in 1929 (Plaintiff's Exhibit 3, Table II).

The freight rates from the Virginia district were lower than the rates from other Appalachian territory, with the

exception of a small subdivision of the Harlan district (Defendants' Exhibit 3, pp. 52, 53, and 57).

The following table shows the competition between Appalachian territory and the smokeless field for the South Carolina business (see P. 15; Defendants' Exhibit 3, pages 52, 53, and 57; Defendants' Exhibit 2, pages 123 and 129):

City	Freight differential	Appalachian coal
Greenville	72¢	98.77%
Spartanburg	62¢	99.06%
Anderson	55¢	99.76%
Columbia	27¢	86.71%
Charleston	20¢	91.67%
Florence	0	99.81%

[fol. 227] A producer, operating in Alabama, with an annual production of approximately 2,500,000 tons, and a capacity of 3,000,000 tons (R. 897-8, 900, 905), gave testimony tending to show that if prices were raised in South Carolina, an attempt would be made to secure an adjustment of the present freight rate so as to permit Alabama coal to enter the State on a more favorable basis (D. 32-5).

A purchaser of 600,000 tons of coal for use by textile mills in South Carolina gave testimony tending to show that Appalachian Coals, Incorporated, could not dominate the market prices for coal in North Carolina, South Carolina, Georgia and Eastern Tennessee, because Alabama coal and coal of non-defendants would be available (R. 888, 889. Also 854-857 and 864.) (D 32-5).

There is a possibility of competition between the defendant producers and the Smokeless Field and with Alabama coal in South Carolina (R. 418, 429, 524, 738-9, 553, 518). But considering the total rail shipments of coal to South Carolina in 1929, it appears that 3.99 was Smokeless coal, .08 Alabama coal, and 94.25 Appalachian coal (DX. 2, 123, 124).

[fol. 228] Georgia

(37) The amount of coal consumed in this State in 1929, according to Defendants' Exhibit 1, Table VI, and Defend-

ants' Exhibit 9, other than railroad fuel, was 3,024,574 tons, made up as follows:

(a) Appalachian territory	2,541,533
(b) Other territory	483,041
Total	3,024,574

Thus Appalachian coal was 84 per cent.

The defendant producers shipped 45.7 per cent of the total coal consumed in Georgia (Px. 21).

The origin of coal from other territory is shown by the following:

Alabama	459,463 tons
Georgia	12,921 tons
Smokeless Fields	10,257 tons
Western Kentucky	400 tons
Total	483,041 tons

The coal mined in Georgia, according to Defendants' Exhibit 1, Table VI, was as follows:

Coal not shipped	715 tons
Coal consumed in Georgia	12,921 tons
Coal shipped to Tennessee	31,000 tons
Making total of	44,636 tons

[fol. 229] In 1929, the defendant-producers shipped 45.7 per cent of the total coal consumed in the state, as shown by the above table (See D. 33 x 6). The total consumption of Georgia in the year 1929, including railroad fuel, amounted to 3,626,494 tons (P. 17; defendants exhibit 2, page 125).

The origin of this coal is shown by the following:

From Appalachian territory	75.53 per cent
Alabama	18.09 " "
Middle Tennessee	6.07 " "
Smokeless field	.31 " "
	100

The shipments in 1929 of Bituminous coal to Atlanta amounted to 816,182 tons; of which Appalachian coal constituted 85.67 per cent.

To Augusta, 146,896 tons, of which Appalachian coals comprised 87.36 per cent (P. 17; defendants' exhibit 2, page 125.)

Alabama coal has an advantage in freight rate of 17 cents per ton over the Appalachian territory, but Appalachian coal is superior in quality and has a lower cost of production than some Alabama coal (R. 908, 912, 983) P. 17.

In Georgia, Appalachian coals will meet competition from the coal of non-defendants (R. 837, 925, 926, 928, 931). And also from coals from Central Tennessee, Western Kentucky and Alabama (R. 418; defendants' exhibit 2, page 125) (D. 33-6).

[fol. 230] The State of Georgia is relatively a small consumer of coal (R. 528 and 539).

The coal fields of Alabama are closer to Georgia than the coal fields of the Appalachian region (R. 528, 982, 985, 986).

The Alabama operator, mentioned above, having a production of approximately 2,500,000 tons per annum, and a capacity of 3,000,000 tons (R. 897-8) gave evidence tending to show that Appalachian coals would meet in Georgia competition from Tennessee coals, that are not included in the Appalachian Coals, Inc. from Alabama coal, from fuel oil on the Southern Atlantic coast, from hydro-electric power and natural gas in the interior (R. 905-6).

Natural gas has taken the place of 400,000 to 500,000 tons of coal in the State of Georgia in the last few years (R. 911).

The source of the energy consumed in Georgia in 1929 as shown by Plaintiff's Exhibit 8, Table I, was as follows:

From coals	72.3%
From other fuel	5.5%
From water power	22.2%
	100.0%

[fol. 231] The total energy consumed by manufacturers in Georgia in 1929, as shown by Plaintiff's Exhibit 8, Table II (p. 17), was derived from the following sources:

Coal	58.8%
Other fuel	12.2%
Water Power	29.0%
	100.0%

A total of 1,153,514 tons of bituminous coal was used in manufacturing industries in Georgia in 1929, and in terms of value this consumption constituted 30.25% of the whole, whereas electric energy amounted to 54.76% of the total value of all fuels used in manufacturing industries (Defendants' Exhibit 10; D. 33-6).

North Carolina, South Carolina, and Georgia

(38) The total consumption of these three States, exclusive of railroad fuel, as shown by defendants' Exhibit 1, Table VI, in the year 1929, was 8,639,976 tons (D. 29-2; Defendants' Exhibit 9); including Virginia, about 9,200,000 tons. From eight to ten per cent of the coal produced in Appalachian territory goes to these four States (R. 542), i. e. 10% of 95,000,000 or 8% of 107,000,000.

[fol. 232] The total production of the non-defendants, excluding captive mines, but including the surrounding territory, in the year 1929, was 32,541,841 tons, or about four times the total consumption of the three states (P. 29 supra; D. 29-2).

The total productive capacity of mines of non-defendants in the Southern Appalachian region, including captive mines and the surrounding territory, is 82,660,760 tons (Defendants' Exhibit 8H) (D. 29-2).

From this figure there should be deducted approximately ten per cent to cover the coal produced in the Hazard District, which has no railroad connections to the three states under discussion (R. 540) (D. 29-2).

This figure is based upon the capacity of all the defendant mines, including captive mines, both active and inactive (Record 283) (P. 20) (R. 277-8).

The Hazard and McRoberts Districts have no rail connections to the three states under discussion (R. 507, 526).

And in addition there is a wide range in the freight rates to these states from the different districts in the Appalachian territory (P. 20).

[fol. 233] Thus, the rates from these districts to Greenville, South Carolina, range from $2.53 to $3.35 a ton; to Asheville, North Carolina, they range from $2.19 to $3.37 a ton; to Atlanta, they range from $2.09 to $3.81 per ton. (See defendants' exhibit- 3, 51, 54 and 57; P. 20.)

The significance of these differences in freight rates are to be considered not only in connection with potential capacity, but also with reference to the coal actually produced at this time.

There is testimony of non-defendant producers having an aggregate annual production of 1,150,000 tons, and annual capacity of 2,450,000 tons that they are assessible to the markets in these three states, and sell substantial quantities of coal therein, and have the power to increase the tonnage in the event of any increase in price, or in the event of an attempt by Appalachian Coals, Incorporated, to dominate the market in these states (R. 823, 825, 826, 836, 837, 840, 841, 926-928, 923, 768, to 770, 819, 873, 863, 840, 841).

A non-defendant producer in the Appalachian territory gave evidence tending to show that the production of non-defendants in the Harlan District, not including captive mines, was 1,945,000 tons in 1931, a year of small production; that the productive capacity of these mines is [fol. 234] approximately 4,000,000 tons, and that the non-defendants in Harlan and Bell Counties alone could supply the entire requirements of the three States (R. 825, 826) (D. 29-2).

There is also competition in the three States with hydro-electric power and fuel oil; the latter being particularly found along the coast, though it is also used in increasing amounts in Diesel engines in the interior (R. 842, 875, 860, 862, 1402, 1403.) (D. 30-3).

Seventy-five per cent of the textile mills, in the three States, are equipped to use hydro-electric power, but many new plants are going back to steam (R. 862, 863).

In Georgia during the past three years natural gas has come to Atlanta, Augusta, Albany and many other cities, and is being used by 94 companies that formerly used 471,000 tons of coal (Plaintiff's Exhibit 37; R. 528, 529, 981, 982, 1401, 1402).

Very little coal is used in these three States to produce hydro-electric power because of superpower hook-ups, which enable the electricity produced in any one section of the country to be used in another when there is a local shortage of water power. It is estimated that in Georgia

alone the consumption of coal on this account has been reduced between 400,000 and 500,000 tons annually (R. 905, 906, 910, 911, 936, 948, 980, 981).

[fol. 235] Michigan

39. The total consumption in this State in 1929 was 19,947,446 tons (D. X 1, Table VI; D. X 9, P. 21; D. 34-7). These figures include only rail shipments and do not include Lake cargo shipments. The origin of this coal was as follows:

Appalachian coal	14,522,291
Smokeless coal	3,843,130
Ohio, Pennsylvania, Northern West Virginia, etc.	1,582,025

The same figures for 1929 as shown on Defendants' Exhibit 2, page 5, are as follows:

Appalachian coal	14,311,087	73.70%
Smokeless coal	3,796,568	19.55%
Ohio coal	750,052	3.86%
Northwestern Virginia, Indiana, Illinois and Kentucky	559,854	
Total	19,417,561	

The same figures for the year 1931 taken from Defendants' Exhibit 2, page 5, are as follows:

Appalachian coal	8,836,199	68.11%
Smokeless coal	2,617,245	20.17%
Ohio coal	1,051,757	8.11%
Northern West Virginia, Western Pennsylvania, etc.	469,082	
Total	12,974,283	

The defendants shipped 43.2% of the all rail shipments to this State in 1929, excluding captive mines (P. X 21).
[fol. 236] According to P. X 2, Table III, the number of defendants competing with each other for the sale of coal in Michigan in the year 1931 was 97 (P. 24). In the years 1929 and 1931 the percentage of rail deliveries of coal from the Appalachian territory to certain Michigan cities which

consumed over 2 million tons in those years was as follows (D. X 2, pp. 85, 73, 87, 83, 79; P. 21):

	1929	1930	1931
Kalamazoo	91.88	91.11	90.11
Battle Creek	90.88	89.35	84.38
Lansing	83.28	81.20	82.69
Jackson	78.37	76.84	75.09
Flint	86.84	77.63	72.26

The chief competitor of Appalachian coal in Michigan is from the Smokeless region, which has a 25 cts. higher freight rate to Michigan than the Appalachian coal (D. X 9). (P. 21.) Thus, in 1929, according to Defendants' Exhibit 1, Table VI, Smokeless coal amounted to 3,843,132 tons as against Appalachian coal, 14,522,291 tons.

Ohio during the same year shipped 750,581 tons to Michigan, of which about one-third was from Northern and two-thirds from Southern Ohio. Part of Ohio has the same freight rate to the Michigan peninsula as Appalachian territory, part of Ohio has a freight rate 25 cents less, and part a freight rate 50 cents less, but Ohio coal generally speaking is of poorer quality (R. 178, 248, 255, 1055; P. 21; D. X 9; R. 625).

Coal from the Ohio district is available for all practical purposes in Michigan, and there is actual as well as potential competition in that market. Appalachian coal holds the market by reason of price (D. 34-7; R. 629-632). When [fol. 237] coals from the Appalachian region were first sold in the markets North and West of the Ohio River, they were considered more desirable because they were better cleaned and prepared, but at the present time Western Pennsylvania and Ohio producers have installed modern equipment for the cleaning and preparation of coal, and this fact tends to put these coals on an equal competitive footing with the coal from the Appalachian region (R. 633, 634; D. 34-7).

Coal going into Michigan from Western Pennsylvania, Northern West Virginia (including the Fairmont Field) and the Northern Panhandle of West Virginia has the same freight rate as coal from the Appalachian territory.

All rail shipments to the lower peninsula of Michigan from the Appalachian territory dropped from 14 million

tons in 1929 to 8,800,000 tons in 1931, and from a percentage of 73.7% to 68.11% of the total all rail shipments. In the same years shipments from Ohio districts increased from 750,000 tons in 1929 to 1,050,000 tons in 1931, or an increase from 3.86% of total shipments to 8.11%. Hence, while the production of coal generally was rapidly decreasing, Ohio coals more than doubled their percentage of consumption in the Michigan peninsula (D. 35-7; R. 787-788, 1067-1068).

Coal from Western Pennsylvania also competes with Appalachian coal in Michigan (R. 440, 443, 445, 1004).

There is also competition in the State with oil and gas, and in the last two years persons who had been consumers of coal for more than twenty years adopted the use of natural gas (R. 560). (D. 35-7.)

[fol. 238] In Detroit the coal shipped from the Appalachian territory decreased from 68.36% in 1929 to 58.16% of total shipments in 1931; and in the same years coal from the Fairmont district of West Virginia, Western Pennsylvania and Ohio districts doubled in percentage, .86 to 1.80%. In the city of Flint, the percentage of Appalachian coal decreased from 86.48% in 1929 to 72.26% in 1931, and in the same years coal from Ohio districts increased from 4.46% to 19.55%, while coal from the Fairmont district increased from .73% to 2.21% (D. X 14, pp. 4-6).

Competition from fuel oil is severe in the State and has displaced approximately 370,000 tons of coal in twenty-three industrial plants (D. X 39, R. 1469-1470). Natural gas and electricity are substantial competitors of coal (R. 1227-1228).

In 1929 the total energy consumed by all manufacturing establishments in Michigan was derived as follows: 88.5% from bituminous coal; 8.3% from other fuels, and 3.2% from water power (P. X 8, Table II). Of the total energy consumed by manufacturing establishments in twenty leading counties of Southern Michigan, more than 80% was derived from bituminous coal in 19 of these counties, and over 99% in three of these counties (P. 9, Table I); (P. 21.)

Ohio

40. The total consumption of coal in this State in the year 1929, according to Defendants' Exhibit 1, Table VI, was 45,847,286 tons. This coal was derived from the fol-

lowing sources: Appalachian territory, 15,941,414 tons, or 34.8% of the total. There was also approximately 2,500,000 tons from The Fairmont District of West Virginia, 5 mil- [fol. 239] lion tons from Northern Ohio, 2,370,000 tons from Southern Ohio, 5,300,000 tons from the Smokeless region, and approximately 14,000,000 tons from Western Pennsylvania and the West Virginia Panhandle. According to Defendants' Exhibit 2, pages 1 and 2, the shipments into Ohio were as follows:

	1929	1931
Appalachian territory	14,012,876	8,605,456
Northern West Virginia	2,948,673	1,734,438
Smokeless region	5,340,729	3,324,233
Western Pennsylvania	13,623,552	7,574,679
Ohio	7,299,091	7,218,383
Total	43,224,921	28,460,189

According to these figures the percentage of shipments from the Appalachian territory was reduced from 32.42 per cent. to 30.25 per cent. There were also reductions in the percentages from Northern West Virginia and the Smokeless Field and Western Pennsylvania, but the percentage of shipments from Ohio increased from 16.89 per cent. to 25.36 per cent.

Of the all-rail shipments to Ohio in 1929 the defendants shipped 33.7 per cent. of the tonnage consumed, other than receipts from captive mines (D. X 41; P. 22; D. 35-8; P. X 21).

The number of defendants competing in Ohio in the year 1931 was 100 (P. X 2, Table III; P. 24).

In Ohio coal produced by defendants goes into competition with coal produced by non-defendants in the Appalachian territory, and also with coal produced in the Ohio districts, in the Fairmont district, and the Panhandle regions of West Virginia. There is also competition from the Pennsylvania high and low volatile areas, from the West Virginia low volatile areas, and slight competition from Indiana [fol. 240] coals; but there were no rail or water shipment of Indiana coal to Ohio from 1929 to 1931 (D. 1 table 6.) Illinois mines have rates that enable them to ship coal into Ohio if the market demand justifies it (R. 568). In 1929 the Ohio districts produced approximately 24 million tons and

these districts have a capacity of approximately 42 million tons (R. 568-569; D. 36-5).

The percentage of Appalachian coal consumed in the entire State of Ohio does not reflect the relative importance of that coal in the South Central and Western parts of the State where the freight rates from Appalachian territory are either lower than or equal to those from Western Pennsylvania (D. X 3, pp. 5, 8, 15, 17, 19; P. 21).

The percentage of Appalachian coal shipped into certain Ohio cities in the years 1929 and 1931 is shown by the following table (D. X 2, pp. 61, 43, 65, 57, 37; P. 22):

	1929	1930	1931
Miami Valley	91.98	89.81	90.28
Dayton	76.05	76.07	76.48
Springfield	90.42	88.28	87.51
Marion	75.18	66.95	66.17
Cincinnati	69.38	66.11	66.57

Ohio coal has a freight rate advantage of 25¢ a ton over coal from the Appalachian territory on shipments into Southern and Southwestern Ohio, as shown in the area marked "1" on Defendants' Exhibit 9. Ohio coal has a freight rate advantage of 50¢ a ton over Appalachian coal on shipments into Northwestern Ohio, as shown in the portion of Defendants' Exhibit 8 marked "2" (D. 36-8).

Along the Southern area of Ohio on the Ohio River, coal can now be moved from West Virginia, Northern West Virginia and Western Pennsylvania by barge (R. 572).

[fol. 241] The all-rail movement into Ohio shows that the percentage shipped from the Appalachian region has decreased from 32.42% in 1929 to 30.25% in 1931. The decrease is illustrated by consumption in certain cities, to-wit, in Columbus, Ohio, the percentage decreased from 61.32% in 1929 to 53.66% in 1931; and in the same years the coal from all Ohio districts increased from 31.86% to 40.88%. In Fostoria Appalachian coal decreased from 55.69% in 1929 to 46.30% in 1931, while in the same years coal from the Ohio districts increased from 30.46% to 39.46%. In Lima, Appalachian coal decreased from 73.43% in 1929 to 57.82% in 1931, while Ohio coal increased from 21.13% to 39.48%. In Marion, Appalachian coal decreased in this period from 75.18% to 66.17%, while Ohio coal increased from 15.8%

to 22.91% (D. X 14, pp. 1, 2, 3; D. 37-8). In 1929 Appalachian coal constituted 69.38% of the total all-rail coal going into Cincinnati, including shipments by defendants and non-defendants, but not including coals going into Cincinnati by water (D. X 2, p. 37; R. 563). About one-half of the high volatile coal, amounting to something over 1½ million tons, goes into Cincinnati by barge down the Ohio River (R. 574). Western Pennsylvania coal for fifty years moved down the Ohio River into Cincinnati, and can now do so. This is also true of the Pomeroy, Ohio, districts, and of the West Virginia Panhandle district (R. 574, 579-585) (D. 37-8).

Competition from natural gas and fuel oil in Cincinnati is keen and has displaced substantial tonnages of coal (R. 588, 948; D. 37-8).

The total consumption of energy in Ohio in 1929 derived from fuels and water power is shown in percentages as follows: from coal, 88.7%; from other fuels, 11.2%; from water [fol. 242] power, .1% (P. X 8, Table 1). The total energy consumed by manufacturing establishments in Ohio in 1931 was derived as follows: 90.7% from coal; 9.2% from other fuels; .1% from water power (P. X 8, Table II); (P. 22).

Indiana

41. The total tonnage of coal consumed in this State in 1929, excluding the Chicago area, according to Defendants' Exhibit 9 and Defendants' Exhibit 1, Table VI, was 14,632,580, of which 6,484,157 tons, or 44.3%, came from the Appalachian region; 5,680,664 tons came from Indiana, and 1,206,715 tons from the Smokeless region. The defendants furnished 33.8% of the total, other than receipts from captive mines (P. X 21; D. 37-9).

According to Defendants' Exhibit 2, page 7, the total shipments into Indiana, except the Chicago fields, in 1929 were 14,215,437 tons, of which Appalachian territory shipped 6,429,272 tons, or 45.23%; Indiana shipped 5,502,336 tons, or 38.71%, and the Smokeless territory 1,208,350 tons, or 8.50% (P. 23).

The figures for certain cities and groups of cities in Indiana for the years 1929 to 1931 are shown by the following

table taken from Defendants' Exhibit 2, pp. 95, 103, 93 and 105:

	1929	1930	1931
Gas Belt	63.76	65.90	66.59
Terre Haute	42.23	42.94	45.51
Fort Wayne	66.43	64.70	62.26
Miscellaneous	42.37	43.38	43.56

(P. 23).

[fol. 243] The production of coal in Indiana in the year 1929 exceeded 18 million tons, which figure may be compared with the consumption in the State, exclusive of the Chicago district, of approximately 14,600,000 tons. Coal from the Pittsburgh-Fairmont region goes into Northern Indiana on the same rate as coal from the Southern Appalachian region. Coal produced by the defendants goes into competition with coal produced by non-defendants, and with coal from the Fairmont district, the Smokeless district, Western Pennsylvania, all the districts of Ohio, Indiana, Illinois, and Western Kentucky (D. 38-9. See P. R. B. 29). But the competition from five and six districts is negligible. Of the 1931 consumption in Indiana, outside of the Chicago District, the Fairmont District supplied .24%; Western Pennsylvania .03%, Ohio 1.14%, Illinois 2.38%, Western Kentucky 1.39%; Appalachian territory, 46.95% (D. X 27).

The percentage of Appalachian coal decreased from the years 1929 to 1931. For instance, in the city of South Bend, Appalachian shipments decreased from 45.88% to 40.86%, while coal from the Indiana mines increased from 18.30% to 32.34% (D. X 14, p. 6). Ohio coal goes into Northern Indiana on a freight rate 50¢ per ton less than Appalachian coal, and into the southern half of Indiana on a freight rate 25¢ less, and into Northwestern Indiana, including the Chicago district, on a freight rate 35¢ a ton less (D. X 9). Coal from all the districts of Indiana, Illinois and Western Kentucky goes into Indiana at substantially lower freight rates than Appalachian coal, the differences ranging from $1.64 to .44 (D. X 14, p. 6; D. X 38-9).

The number of defendants competing for the Ohio business in the year 1931 was 95 (P. X 2, table III; p. 24).

[fol. 244] The energy consumed in Illinois and in Indiana in 1929 was derived, to the extent of 92.7%, from coal, and the energy consumed by manufacturing establishments in

those States in 1929 was derived, to the extent of 88.2 per cent., from coal. Separate percentages from Indiana are not available (P. X 8) (P. 23).

Chicago District—State of Illinois

42. Total amount of coal consumed in the Chicago district, according to Defendants' Exhibit 9 and Defendants' Exhibit 1, Table VI, in the year 1929 was 32,254,255 tons, of which the Appalachian territory furnished 7,429,543 tons, or 23%. These figures include coal produced both by defendants and non-defendants, and also tonnage from captive mines (D. 37-9).

In the same year the total coal consumed in Illinois outside of the Chicago area was 19,230,660 tons, of which 1,850,215 tons, or 9.6%, came from the Appalachian district (D. 37-9; D. X 1, Table VI).

A substantial percentage of coal from the Appalachian region going into the Chicago district is shipped by captive mines. For instance, the United States Steel Corporation, the Inland Steel Company, Wheeling Steel Corporation, and the Interlake Iron Company. In 1929 these four companies shipped 3,747,725 tons into the Chicago district (R. 639-642; D. 38-9). This captive tonnage, together with the unknown quantity of coal produced by non-defendants, should be taken into consideration in calculating the percentage sent by defendant-producers into the district. Defendants estimate that total shipments by the defendants do not exceed [fol. 245] 10% of the total.

The coal from the Appalachian region decreased between 1929 and 1931 from 21.44% to 18.68%, whereas the coal from Indiana districts increased in the same years from 8.66% to 10.91%, and coal from Illinois districts increased from 31.24% to 33.05% (D. X 2, p. 107).

Coal from Western Pennsylvania competes actively in the States of Indiana, Illinois, and in the Chicago district, and producers in Western Pennsylvania are endeavoring to regain markets lost as a result of labor problems, transportation deficiencies, and the zoning of coal by the United States Fuel Administration, which forced the Western Pennsylvania producers out of that market (R. 443-444).

Coal goes into Northwestern Illinois from the Appalachian region, Western Kentucky, Iowa, Indiana, Northern West Virginia, Illinois, and Pennsylvania (R. 937). Rail-

roads in this area are buying coal in Illinois, Indiana, Ohio, and Northern West Virginia, and these coals are interchangeable (R. 937; D. 39-9).

Lake Shipments

43. These shipments include shipments by rail from various coal districts to loading points on Lake Erie and thence by boat to points on Lakes Erie, Huron, Michigan, and Superior, and the St. Lawrence River. The Lake docks, especially on the west shore of Lake Michigan, and of Lake Superior, take in large quantities of domestic coal during the summertime for distribution in Canada, Wisconsin, Minnesota, North and South Dakota (R. 565). None of these docks are owned or controlled by the defendants. They are owned by producers in Ohio, Pennsylvania, and [fol. 246] Northern West Virginia (R. 1490-1491; D. 39-10).

Defendants' Exhibit 1, Table VI, shows that the total Lake shipments in 1929 were 39,204,835 tons, of which Appalachian coal amounted to 17,172,446 tons, or 43.8%.

The percentage of Appalachian coal to these points decreased from 43.88% in 1929 to 42.82% in 1931, while the Ohio shipments increased from 9.57% to 10.95%, and Western Pennsylvania from 21.09% to 24.52%. These figures are taken from Defendants' Exhibit 2, page 117.

The figures from Defendants' Exhibit 1, Table VI, so far as they relate to the Appalachian region, include production by defendants, non-defendants and captive mines (R. 561-562; D. 40). The remaining tonnage, according to Defendants' Exhibit 2, page 117, was as follows: Northwestern Virginia-Fairmont, 5.75%; Southwestern Virginia, Virginia and Maryland (low volatile), 19.71%; West Virginia, 21.09%; Ohio, all districts, 9.57%. The production and the productive capacity of these districts is more than sufficient to supply the requirements for Lake shipments (R. 562-563).

In the matter of freight rates, coals shipped on the lakes from the Appalachian region have a freight rate disadvantage of 38 cents a ton as against the Ohio districts, with the exception of Virginia, which has a freight rate disadvantage of 53 cents a ton as against Ohio. As to Western Pennsylvania coal, the Appalachian districts, with the [fol. 247] exception of Virginia, have a freight rate dis-

advantage of 35 cents a ton, and Virginia has a freight rate disadvantage of 50 cents a ton. The freight rate disadvantage of the Appalachian region on lake shipments, as compared with the freight rates from Ohio, Northern West Virginia and Western Pennsylvania, ranges from 35 to 53 cents a ton (R. 563-565).

The reason Southern Appalachian coal is able to take lake cargo business in spite of adverse freight rates is that, during the War, Southern Appalachian coal was zoned into this market and each producer was required, during certain periods, to ship a certain percentage of his total production into that market. Since that time the retention of these markets by the Southern Appalachian producers has been due in large measure to competitive prices in these markets. The markets are an outlet for domestic coals for which the Southern Appalachian producers have no demand during the summer time, when the demand exists chiefly for nut and slack coal for industrial purposes. In order to keep the mines in operation the Southern Appalachian producers have met competitive prices in the lake cargo markets in order to retain this business (R. 565).

The defendant producers shipped 5,974,487 tons out of the 17,172,446 tons of coal shipped from Appalachian territory to the lake markets in 1929 (D. X 1, Table VI).

A large factor in this movement of coal from the Southern Appalachian region into the lakes has been that large industrial concerns having steel and by-product coke plants on Lake Erie, Lake Huron, Lake Michigan and Lake Superior ship large quantities of coal to these plants during [fol. 248] the season of open navigation because they can deliver coal to these plants during that reason by lake cheaper than they can all-rail, and all of them try to take in the greater part of their year's supply during this season of open navigation. Instances of this movement are United States Steel Corporation, International Harvester Company, Inland Steel Company and the Ford Motor Company. These companies all own captive mines in the Southern Appalachian region (R. 566). Another instance is the Cannelton Coal and Coke Company, with an annual production of 727,000 tons. These are captive mines of the Algoma Steel Company, of Algoma, Canada, and during the period of lake navigation a substantial part of their production is sent to their own plants (R. 642). It is therefore

probable that the coal shipped on the lakes by the defendant producers would not exceed 25% of the total lake shipments in 1929 (D. 39-10).

States in Northwest

44. In the States in the Northwest, the following tabulation shows the total coal consumed in 1929, the total shipments of coal all-rail from the Southern Appalachian region and the percentage that the coal from the Southern Appalachian region bears to the total.

Destination	Total consumed	Total coal from Sou. Appal. region	Percentage
Minnesota	1,655,714	237,118	14.3
Wisconsin	2,613,169	299,813	11.5
Iowa	7,921,207	1,621,689	20.5
North Dakota	1,447,304	None	None
South Dakota	721,689	68,069	9.4
Nebraska	3,588,929	17,053	0.5
Kansas	2,367,985	6,281	0.3
Missouri	10,186,388	296,946	2.9

(Defendants' Exhibit 9.)

[fol. 249] The figures given above for the coal consumed in the States named coming from the Southern Appalachian region includes shipments by defendant and non-defendant producers and by captive mines. In the markets in these States coal from the Southern Appalachian region comes into substantial and active competition with coal from the Western Pennsylvania and Fairmont regions and goes into these markets all-rail on the same freight rate (R. 643). In addition, there is competition from coal produced in the State of Iowa and the State of Missouri (D. X 1, Table II), and a substantial amount of lignite coal produced in North and South Dakota is shipped as far East as Minneapolis and St. Paul (R. 644, 1079). A considerable tonnage of coal from Western Pennsylvania is shipped into the lake dock territory. Two by-product plants in that region are now using both Southern Appalachian and Western Pennsylvania coal; a large public utility operating a chain of plants throughout the Northwest has bought coal from both Western Pennsylvania and the Southern Appalachian fields, and is now using coal from both regions at its plants. On the banks of Lake Michigan there are two by-product plants, both of which were solicited by a Western Pennsylvania operator, and one of these plants uses Western Pennsylvania coal and the other uses Southern Appalachian coal.

A big steam plant on the west bank of Lake Michigan is using both Western Pennsylvania and Southern Appalachian coal indiscriminately; and one of the largest steam plants in Northern Michigan is buying coal from both the Western Pennsylvania and Southern Appalachian fields (R. 440). Coal from the Central Pennsylvania fields is a potential competitor and, to a slight extent, an actual com- [fol. 250] petitor in the lake markets (R. 950). The receipts of bituminous coal at the docks at Duluth, Superior, Ashland and Washburn show that between the years 1927 and 1931 coal received from the Pittsburgh district increased 5½% and coal received from Ohio districts increased 4% (D. X 19; D. 41-11).

Duluth and Superior Docks

45. In the market supplied by coal from the Duluth and Superior Docks, and covering a range of 200 miles, including Minneapolis and St. Paul (R. 1090), Southern Appalachian coal is in competition with coals from Illinois, Indiana, Western Kentucky, lignite coal, coal produced in Arkansas, and with oil, natural gas and hydro-electric power. There has been a development of hydro-electric power in the Duluth market, and the coal docks now use hydro-electric power in the operation of those docks, instead of coal. In this same market natural gas is a strong competitor, and there is heavy competition in fuel oil. This has had an effect on the volume of the coal business in this market (R. 1081-1083, 1086-1087). At Rochester, Minnesota, the Franklin Heating Company has cancelled its contracts for coal and is now using natural gas to heat the Mayo clinic and the hospitals in that city (R. 1086). Oil burner installation in the cities of Minneapolis and St. Paul have increased at a rapid rate from 1928 to 1931. On January 1, 1928, in these two cities there has been installed 2,747 oil burners for heating homes with the use of fuel oil as a fuel. In the year 1928 there were 1,139 additional oil burners installed; in the year 1929 there were 1,924; in the year 1930, 2,831; and in the year 1931 2,975 additional oil burners were [fol. 251] installed (D. X 22). The installation of these oil burners has necessarily displaced a large tonnage of coal for use by domestic consumers (R. 1088-1089). At the present time seventeen cities in the State of North Dakota, eight cities in the State of Minnesota, and thirteen cities in

the State of South Dakota are now using or have contracted to use natural gas (D. 42-12).

Tidewater

46. Of a total of 36,054,877 tons of coal moving to tidewater in 1929, 4,575,970 tons, or 12.7%, were shipped from the Appalachian region (D. X 1, Table VI). Tonnage other than Appalachian came from the low volatile fields of Southern West Virginia, Northern West Virginia, the Maryland and the Pennsylvania fields. The Smokeless fields of Virginia and West Virginia in 1929 shipped 17,451,109 tons of coal to tidewater. These fields enjoy a freight rate of ten cents a ton lower than the rate from the Appalachian region. Coal from the Appalachian region going to tidewater to New England comes in competition with all Smokeless coal. It comes in competition with coal going to tidewater from the port of Baltimore with rates of $2.25 to $2.50 a ton, and with coal going to the port of Philadelphia with rates varying from $2.32 to $2.57 a ton, as compared with a rate of $2.62 to $2.72 from Appalachian districts. In addition to the coals going to tidewater to all points north of Washington, coals from the Appalachian region are in competition with all-rail coals going from Maryland, Northern West Virginia and Pennsylvania to all-rail points from Washington north to Maine. Until a few years ago there were some millions of tons of coal used for [fol. 252] bunkering purposes at the principal ports along the Atlantic Coast. That tonnage has been very materially reduced by competition from oil. In addition, fuel oil in large amounts is being delivered to industrial plants along the Atlantic Seaboard, and is going inland for a considerable distance. It has displaced a very considerable tonnage of coal (R. 495-497, 442). Coal going from the Appalachian region into the Northeastern States, in addition to tidewater, meets competition from coal coming from Central Pennsylvania (R. 935-937) (D. 43-13).

Florida

47. According to Defendants' Exhibit 1, Table VI, the consumption of coal in Florida in the year 1929 was as follows:

From the Appalachian region	145,360 tons
Alabama	341,334 "
Smokeless region	22,069 "
Total	508,763 "

This table indicates that Appalachian coal was 28.6% of the total.

According to Defendants' Exhibit 2, page 127, the consumption of coal in the year 1929 in Jacksonville and Tallahassee, and the State of Florida on and north of the S. A. L. Railway, River Junction to Jacksonville, is shown by the following table:

	Jacksonville	Tallahassee	Florida
Appalachian Coal	69,013	8,609	76,024
Smokeless Coal	2,944	.....	3,599
Middle Tennessee	.....	.....	959
Alabama	16,444	2,076	51,687
Total	89,265	10,685	132,269

[fol. 253] This table shows that of the total amount of 132,269 tons of coal delivered by rail to this portion of Florida, 57.48% was Appalachian coal, and that of the 89,265 tons delivered to Jacksonville, 77.31% was Appalachian coal (P. 25).

Capacity of Defendant and Non-defenadnt Mines

47a. The capacity of the non-defendant mines in the Appalachian region is 82,660,760 tons, as against a capacity in the defendant mines of 86,628,880 tons. The present yearly capacity of all mines in Southern West Virginia, Virginia, Eastern Kentucky and Tennessee is 245,233,560 tons, based on an eight hour working day (DX 8, Sheet H). This excess capacity over actual production could be brought into production at moderate expense and with reasonable promptness (R. 281, 284, 391, 278, 279, 286, 287, 898 and 923); (D. 6-3).

Potential Undeveloped Capacity in Appalachian Territory

48. In the eight districts in the Appalachian region alone, not held by any operating company or by any captive company, there are approximately 760,000 acres, containing more than 4,300,000,000 tons of recoverable coal. In addition to that amount, in the same territory, owned by captive companies and not being operated, or owned by operating

companies who are using only a very small proportion of their holdings, there is an additional 860,000 acres, containing more than 4,600,000,000 tons of coal. Within the twenty-four counties in which the defendant producers are located, and immediately adjacent to them, on railroads already operating and in existence, with the exception of short, feeder extensions, there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal, comparable both in quality and mining conditions with the coal now being mined in that region. The opening up of this acreage would involve only the extension of short branch lines from the railroads and [fol. 254] the building of mining plants (R. 655-656, 1231, 1232). The price of these lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis (R. 1233). Coal produced from these districts is available for any market in which Appalachian coal is sold. Conditions in the coal industry are such that new companies are free to enter the business of producing and marketing coal in competition with existing companies (R. 1480-1483.) D. 23-2).

Effect of the Organization of Appalachian Coals, Inc.

No Competition Between Defendants

48a. The effect of the contracts between the defendants and Appalachian Coals, Inc. is to eliminate all competition among the 137 defendants in the sale and distribution of their coal in interstate commerce. Counsel who approved the legality of the plan in his opinion set out in Exhibit B, page 23, said that the adoption of the plan "by certain producers in a particular producing district will, of course, eliminate competition formerly existing between the parties." He added that the controlling purpose of the agreement, however, was to eliminate unnecessary duplication of selling agents and this would prevent, or at least lessen, the losses now suffered by the producers, and also that it was hoped that forced sales of coal below the actual cost of production would be largely eliminated. The public, he said, would be amply protected by competition from coal produced in other districts and by non-defendant producers in the Appalachian territory (P. 11).

The price of coal sold by the Selling Agent would be fixed by a staff of Vice Presidents, in conjunction with the President of the corporation at the central office in constant contact with the principal consuming markets. The central office would be located at Cincinnati to which information as [fol. 255] to competitive conditions will be relayed. The one restriction is that contract sales calling for delivery over a period of more than sixty days will be submitted for approval to the producer as to price (D. 22-6; R. 647-650, 654).

Reference is made in the testimony to competition inside the organization between various grades of coal. Bituminous coal is produced in various sizes and grades. Coals from different regions, and from different mines in the same region, vary in quality and characteristics. Appalachian Coals, Inc. would establish differentials in price between different grades and sizes of coal. (R. 426-427.) But it would fix a price for each grade of coal which would yield the maximum possible realization from the total amount of each grade of coal sold. These sales of various grades of coal at different prices, all fixed by the same Selling Agent, would not constitute competition among defendant-producers (R. 1568; P. 11).

The influence of the organization would be particularly felt in those sections of the country in which at present coal from the Appalachian territory constitutes a large percentage of the total consumption of bituminous coal.

In all consuming markets where a substantial portion of the present consumption is furnished by Appalachian coal, the power of Appalachian Coals, Inc. to control the price of 73% of the commercial production in Appalachian territory would be a market factor and many other producers would follow its price leadership for the purpose of maintaining their present share in these markets upon the basis of the price level established by Appalachian Coals, Inc. The organization of common selling agencies in other producing districts having the same purpose and operating in the same way as Appalachian Coals, Inc. would also affect market conditions (P. 14).

[fol. 256] Improvements in Marketing Conditions

48b. Among the purposes of the organization of the Selling Agent, is to remedy, so far as defendants are concerned, the destructive practice of shipping coal on consignment without prior orders for the sale thereof, which results in the dumping of coal on the market, irrespective of the demand; and also to eliminate the pyramiding of offers for the sale of coal. (See paragraphs 11 and 12, supra.) (D. 20-2; R. 671-673; 774b, 777, 1489, 1427, 1428, 1486-1488, 1493, 781, 1383-1385, 599-602, 1126, 823.)

Other purposes include the systematic study by a department of the Sales Agent of the marketing and distribution of coal, the demand and the consumption and the kinds and grades of coal made and available for shipment by each producer in order to improve conditions (R. 645, 1237, 1476. D. 20-3).

An inspection and engineering department would be maintained to keep in constant contact with customers in order to demonstrate the advantages and suitability of Appalachian coal in comparison with other competitive coals (R. 646. D. 21-3).

An extensive advertising campaign would show the advantages of using coal as a fuel, and the advantages of Appalachian coal particularly. Advertising is expensive, as now conducted by individual operators and is, moreover, ineffective. Substantial economies would be effected in this respect by the Selling Agent. (R. 396, 646, 962.)

A research department employing combustion engineers would demonstrate the proper and efficient methods of burning coal in factories and in homes, and thereby the use of coal by the present users would be retained and increased in competition with such substitutes as oil and natural gas (R. 646, 395, 1238, 1493-1494; D. 21-3).

[fol. 257] Appalachian Coals, Inc. would operate a credit department which would collect credit information from sub-agents and employees and build up a record that will constitute a good index of reliability of purchasers (R. 646-647, 394).

Defendants believe that the result of all of these activities would be the more economical sale of coal, and the economies would be more fully realized as the organiza-

tion of the Selling Agent is perfected and developed (R. 396, 962, 783. D. 21-4).

Since practically all the defendants have indicated that they would designate sub-agents for the sale of coal, it would be only after a year or so of operation that economies could be introduced by the Selling Agent to lessen selling expense (Petition, P. 8, p. 17, R. 783).

Limitation of Production

48c. The question of the limitation of production was discussed at the New York meeting, but it was decided that production could not be legally limited and, in any event, it could not be limited practically. There was no purpose either at the New York meeting or the Cincinnati meetings which resulted in the formation of Appalachian Coals, Inc. to limit the production of coal. On the contrary, it was designed that the producer should produce and the selling agent should sell as much coal as possible. Paragraphs 4 and 6 of the contract between the producers [fol. 258] and the selling agent required the latter to sell all the coal of the producer that could be sold in the markets at the best possible price obtainable (D. 17-19; R. 786, 774b, 777, 800-801, 1474-1475, 1494-1495).

The only agreement which looks towards the curtailment of production is contained in paragraph 4 of the contract wherein provision is made for participation in sales between the various producers when the demand is not sufficient to absorb the output of all of them. In such case it is provided as follows:

"In the event the demand at the time this contract becomes effective is not sufficient to operate the mines of all producers represented by the Selling Agent upon a full time basis, then the participation of the Producer in the total sales of the Selling Agent for the first calendar month after this contract goes into effect shall be such percentage of the total sales made by the Selling Agent for that month that the total car allotment of the Producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the Selling Agent for the same period; and thereafter the monthly participation of the producer in the total monthly sales made by the Selling Agent shall be a percentage equal to the percentage the

Producer's car allotment for the second preceding calendar month bears to the total car allotment of all the producers whose coal is sold by the Selling agent for the second preceding calendar month; it being understood, however, that these percentages are subject to variation due to variations in the [fol. 259] sale of the different sizes, grades and qualities of coals, as above set out; but that it is the purpose of this and all similar agreements that the Selling Agent will, over each annual period, as nearly as conditions will permit, all factors considered, give each producer's mine or mines producing the same or interchangeable grades of coal as nearly its pro rata part of available orders as is reasonably possible. All coal shipped by the Producer under contracts shown in "Exhibit b", filed herewith, shall be counted against the Producer's proportionate tonnage of coal sold by the Selling Agent, as determined in this paragraph."

It will be noticed that the percentage of total sales to which each producer would be entitled under this arrangement is fixed with reference to the producer's car allotment. It is shown (R. 274 and following) that car allotments are made on the basis of the mine rating. Section 1, par. 12 of the Transportation Act of Feb. 28, 1920, (41 Stat. 476), requires all railroads to maintain mine ratings and to distribute cars equitably on these ratings. The mine ratings are fixed in accordance with the regulations of the Interstate Commerce Commission, which were promulgated as the result of an investigation that extended for some years and until 1926 (R. 275). The rating is based on installed productive capacity, that is, on physical conditions of the mine, the past performance in production, the labor supplied, and all other factors that might influence production. A producer may increase his rating by increasing his productive capacity. The quoted paragraph from the contract does not limit the total production of all the defendant producers, but restricts the proportionate amount which any one producer may sell.

[fol. 260] General Objects of Organization

48d. The plan of organization approved at the Cincinnati meeting of December 30, 1931, listed among the probable

results of the successful organization and operation of the Sales Agency, the following:

"By the elimination of dumping and more intelligent selling as outlined herein, to increase the realization to the producer to a level that will enable the operator to pay labor as high a wage as the competitive conditions with coals in more favorably located freight rate zones or regions will permit" (Exhibit A to the Answer, pp. 8 and 9).

The plan approved at the New York conference of December 3, 1931, filed as Exhibit B to the Answer, contains the following on page 12:

"This Committee believes that the adoption of this plan in principle will tend to the stabilization of bituminous coal production in the respective districts, and will develop for the operators a fair return on the capital invested and for the employees a better return in earnings."

The contract between the individual producers and the Sales Agency in paragraph 4 contains the following:

"It is further understood and agreed by and between the parties hereto that the Selling Agent will use its best efforts to sell all the coal produced by the producer at the best possible prices obtainable."

The purpose of the defendants to establish an organization that would exercise substantial influence upon market conditions is shown by the understanding between them that the contracts between the producers and the Sales Agency would not become effective until a minimum of 70% of the tonnage had come into the arrangement (R. 713). A maximum of 80% was fixed, because it was feared that a greater percentage would bring about an unlawful restraint of trade.

[fol. 261]

Expert Opinion

Opinion of Consumers

49. Consumers of coal representing the Louisville and Nashville Railroad, the Norfolk and Western Railroad and the Chesapeake & Ohio Railroad have declared that the organization and operation of Appalachian Coals, Incorpo-

[fol. 262] rated, will be of benefit to the coal industry and

will not restrain competition in the purchase of coal by these railroads (R. 367-368, 372-373, 811-814, 815-816, 1455-1457). These railroads are the largest railroad users of coal operating in the Appalachian region. The Norfolk & Western Railroad uses from two to three million tons annually (R. 352); the Louisville & Nashville Railroad uses from three and one-half to four million tons a year (R. 505); the Chesapeake & Ohio Railroad uses from two and one-half million to three million one hundred twenty thousand tons annually (R. 1454). A representative of a large public utility company operating in Indianapolis and St. Louis, and having power lines extending from Harvey, North Dakota, south into Oklahoma and to the cities of Dubuque and Clinton, Iowa, and Rochester, Minnesota, and along the Atlantic Seaboard in the States of Connecticut and Rhode Island, and consuming annually approximately 2,485,000 tons of coal (R. 752) has stated that the organization and operation of Appalachian Coals, Incorporated, will not affect competition in the markets in which his company buys coal, and that it will have a beneficial effect on the coal industry (R. 756-757). A representative of a power company operating throughout the State of Georgia and using coal in the operation of a steam plant and of a stand-by steam plant, and using from thirty thousand to one hundred twenty-five thousand tons of coal annually (R. 981) has stated that the organization and operation of Appalachian Coals, Incorporated, will not restrain competition in the markets in which his company buys coal (R. 982). A representative of the Carbide and Carbon Corporation, which uses annually about 250,000 tons of bituminous coal, [fol. 263] 100,000 tons of coke made from bituminous coal, and 40,000 to 50,000 tons of petroleum coke, and operating plants that consume coal at South Charleston, West Virginia; Niagara Falls, New York; Cleveland, Ohio; Sault Ste. Marie, Michigan; Indianapolis, Indiana, and Fremont and Fostoria, Ohio, has stated that the organization of Appalachian Coals, Incorporated, will have a beneficial effect in the coal industry and will not restrain competition in the markets in which his company buys coal (R. 1005-1006). The largest purchaser of coal in the States of North Carolina, South Carolina, Georgia and Eastern Tennessee, who purchases approximately 600,000 tons of coal annually

under normal conditions for use by textile mills, located in those States, has stated that the organization and operation of Appalachian Coals, Incorporated, will not control or dominate the price in the markets in which he purchases coal, and that he will be able to purchase coal in an open and competitive market (R. 854, 857, 864; D. 24-3).

Opinion of Dealers

50. The President of the American Wholesale Coal Association, an association of wholesale dealers in the United States and Canada, has stated that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to the wholesalers in the coal industry, and that it will not be able to set the price of coal in any market in which coal from Appalachian territory is sold or to restrain competition in the sale of coal in any such market (R. 599-600; D. 25-4).

The First Vice President, and President for four years, from 1928 to May, 1932, of the National Retail Coal Merchants' Association, a federation of about one hundred [fol. 264] local associations of retail coal merchants, with a membership in excess of 5,000 in forty-two States and in the District of Columbia, has testified that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to the coal industry and will not restrain competition in the sale of coal (R. 1122-1123). A retail coal merchant operating in Columbus, Ohio, and selling at retail from 32,000 to 40,000 tons of coal annually to domestic consumers, has stated that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to the coal industry and will not restrain competition in the sale of coal (R. 1025-1026). A retail merchant operating in the city of Cleveland, Ohio, and selling annually from 25,000 to 45,000 tons of bituminous coal to domestic consumers, has testified that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to his business and that of retailers generally and will not restrain competition in the sale of coal (R. 828, 832-833; D. 25-5).

Opinion of Non-defendant Producers

51. In considering the effect of the organization and operation of Appalachian Coals, Incorporated, upon non-

defendant producers of coal in the Appalachian territory, it is important that there are 130 such producers in the Appalachian territory who sell coal commercially and 20 captive mines in the same territory. There is also a large number of mines that have been shut down and that could be opened up by the owners on short notice (R. 655-656). [fol. 265] Driving its competitors out of business is not contemplated by the defendant producers (R. 657-660, 663-664). A competing producer operating in the Harlan district, with an annual production of approximately 250,000 tons since 1920 (and with a productive capacity of approximately 600,000 tons annually, which can be produced with very little expenditure for additional equipment—R. 819), and with other properties in Knox County, Kentucky, with an annual production of about 70,000 tons and a productive capacity of about 150,000 tons a year, that could be increased to from 200,000 to 250,000 tons a year with very little expenditure of money (R. 820), has stated that Appalachian Coals, Incorporated, would not have the power to drive his companies out of business or to injure them (R. 822-823). An operator of non-defendant companies in the Clinchfield district, Virginia, with an aggregate annual production of approximately 220,000 to 250,000 tons and an annual productive capacity of from 320,000 to 350,000 tons, which could be produced with practically no further capital expenditure (R. 836-837), has stated that the organization and operation of Appalachian Coals, Incorporated, would be a real benefit to the coal industry and would not restrain competition (R. 843-844). A non-defendant producer operating in Campbell County, Tennessee, with an approximate annual production since 1925 of 250,000 tons, which could be increased with very little expenditure to 500,000 tons annually, has stated that the organization and operation of Appalachian Coals, Incorporated, would not have the power to put his company out of business or hurt his busi- [fol. 266] ness (R. 923, 928-929). Non-defendant producers located in Western Pennsylvania, Alabama, Ohio and Illinois have testified to like effect (R. 438, 445-448, 758-759, 897-898, 906, 907, 933, 934, 938, 939, 1062, 1063, 1066-1067). The small coal producer can, to some extent, and for the purpose of producing and marketing coal, produce coal more cheaply than many of the larger companies and is not prevented by higher cost of operation from being a com-

petitor in the market (R. 607-608, 616-618, 1327-1329; D. 26-6).

Statement of Officers of Appalachian Coals, Inc., and Others

52. Certain witnesses produced on behalf of the defendants and others nevertheless indicated that the organization and operation of the Sales Agency would have some effect in raising prices. The President and Vice-President of Appalachian Coals, Inc., said in substance that the organization would not be able to fix prices in an arbitrary way but, by the elimination of certain abuses, and by better advertising and sale organization, the producers would get more in the aggregate for their coal. Other witnesses for the defendants indicated that there would be some tendency to raise the price but that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes (R. 429, 1426, 994, 995, 986, 917, 376-7).

[fol. 267] General Findings of Fact

53. And from the foregoing facts, we conclude as to the ultimate facts in the case:

1. That defendants have entered into a plan for the sale of their entire production of coal through a central selling agency, which is given exclusive power to make sales on behalf of defendants and to fix the prices at which sales shall be made.

2. That the effect of the plan of defendants is to eliminate competition among themselves and fix uniform prices at which their product shall be offered for sale upon the market.

3. That defendants control a substantial part of the coal produced in the section in which they operate and a substantial part of the coal sold in the markets in which they sell.

4. That the effect of the plan of defendants will be to eliminate free competition among a large group of producers of coal and substitute for same concerted action on their part in the offering of their product at uniform prices; and that, because they control so substantial a part

of the coal sold in the United States, this elimination of competition and concerted action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition. The defendant will not have monopoly control of any market, nor the power to fix monopoly prices.

5. That the sales of coal made by defendants are made almost altogether in interstate commerce; and their plan will affect to a substantial degree interstate commerce in coal.

[fol. 268] Conclusions of Law

54. And from the foregoing findings and conclusions of fact, we conclude as a matter of law:

1. That the plan of defendants constitutes a restraint of trade in violation of the Sherman Anti-Trust Act.

2. That the exclusive selling agency representing the defendants constitutes an unlawful combination in restraint of trade forbidden by the act.

3. That the contracts between the producer defendants and the selling agency, and between the selling agency and the sub-agents, are contrary to law and void.

4. That an injunction should issue restraining defendants from proceeding further with the operation of the selling agency or carrying out the contracts between it and the producers of coal, and between it and the sub-agents, and requiring that the charter of the selling agency be surrendered and its corporate existence dissolved.

This the 3d day of October, 1932.

(Signed) John J. Parker, (Signed) Elliott Northcott, (Signed) Morris A. Soper, United States Circuit Judges, Sitting in the District Court of the United States for the Western District of Virginia.

[fol. 269] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

In Equity. No. 1

UNITED STATES OF AMERICA, Petitioner,

versus

APPALACHIAN COALS, INCORPORATED, et al., Defendants

Application by the United States for Injunction under Section Four of the Sherman Anti-trust Act

Decided October 3, 1932

Before Parker, Northcott, and Soper, Circuit Judges

John Lord O'Brian, the Assistant to the Attorney General; Charles H. Weston, Russell Hardy, W. B. Watson Snyder, and Hammond E. Chaffetz, Special Assistants to the Attorney General, for Petitioner.

William J. Donovan, Edgar L. Greever, Horace R. Lamb, Ralstone R. Irvine, and Otto C. Doering, for Defendants.

OPINION—Filed October 3, 1932

PARKER, Circuit Judge:

This is a petition for an injunction under section four of the Sherman Anti-Trust Act of July 2, 1890, heard be-[fol. 270] fore a special court of the three Circuit Judges of the Circuit as provided by 15 U. S. C. A. 28. The complainant is the United States and the defendants are 137 producers of bituminous coal operating in the states of Virginia, West Virginia, Kentucky and Tennessee and a coal selling agency which they have organized. It is alleged that the plan by which this agency is given the exclusive right to sell the coal produced by the defendants and to fix the prices at which same shall be sold is in violation of sections one and two of the Sherman Act. Much testimony has been taken which is covered by a detailed finding of facts which we are filing herewith. In this opinion we shall state only such of the facts as are neces-

sary to an understanding of the application which we make of the controlling principles of law.

The defendant producers, 137 in number, are engaged in the mining of bituminous coal in eight coal-producing districts of Virginia, West Virginia, Tennessee and Kentucky, extending over twenty-four counties of these states. This territory embraces a large part of the Southern Appalachian coal field; and as it is the territory from which the coal to be sold by Appalachian Coals, Inc., the selling agency, is produced, we shall for convenience refer to it hereafter as the Appalachian territory. Defendant producers mine the greater part of the coal mined in this territory and a very substantial part of all the high volatile coal mined in the United States. In 1929, the last year for which complete figures are available, the total production of bituminous coal east of the Mississippi River was 484,786,000 tons. In the Appalachian and immediately surrounding territory, the production was 107,008,209 tons. Of this amount 58,011,367 tons was produced by the 137 defendants, 20,541,841 tons by non-defendant producers in the same territory, 16,455,001 by captive mines, that is mines operated to produce coal chiefly for the consumption [fol. 271] of the owners, and 12,000,000 tons by mines in the immediately surrounding territory. It will thus be seen that the production controlled by the defendants was 11.96 per cent of the production east of the Mississippi, 54.21 per cent of the total production of the Appalachian and immediately surrounding territory, including that of captive mines, 64 per cent of the production of the Appalachian and immediately surrounding territory not including captive mines, and 74.4 per cent of that part of the product of the Appalachian territory proper which is sold commercially.

The cost of transportation narrows the market in which coal can be sold profitably; and the market of coal produced in the Appalachian territory is not the entire United States but the sections of the country which are accessible under existing costs of transportation. A study of the figures for rail shipments in the year 1929 shows that the coal produced in the Appalachian and immediately surrounding territory was an important factor in the markets mentioned in the following table, which covers all of the important

markets in which Appalachian coal is sold.* Its relative importance in these markets may be seen at a glance by comparing the shipments from Appalachian and surrounding territory, set forth in the second column, with the total rail shipments into the markets, set forth in the first. The percentage is shown in the third.

Market	Total rail shipments into Market	Rail shipments from Appalachian territory	Percentage of Appalachian to total
Virginia	4,880,098	1,628,500	33.4
West Virginia	4,428,463	978,769	22.1
Kentucky	4,191,675	2,782,026	66.4
[fol. 272]			
Tennessee	5,582,419	3,228,952	57.8
North Carolina	3,215,337	2,197,545	68.3
South Carolina	2,400,025	2,295,476	96.
Georgia	3,024,614	2,541,533	84.
Ohio	45,847,286	15,941,414	34.8
Indiana other than Chicago District	14,632,580	6,484,157	44.3
Illinois other than Chicago District	19,230,660	1,850,215	9.6
Chicago District	32,254,255	7,429,543	23.
Southern Michigan Peninsula	19,947,446	14,522,291	72.8
Lake Cargo	39,204,835	17,172,446	43.8
Tidewater between N. Y. and Hampton Roads	7,202,877	717,900	10.
Tidewater to N. Y	14,407,000	1,317,000	9.
Tidewater to New England	14,445,000	2,540,000	17.6

We need not go into the figures as to what part of the shipments from Appalachian territory shown above represents coal sold by the defendants. The fact that they mine 54 per cent of the coal produced in the Appalachian and surrounding territory is sufficient proof of the important part which their coal plays in these markets. It is apparent, without further elaboration, that they control not only a substantial part of the production in the field in which they operate, but also a substantial part of the coal sold in the markets in which they compete.

Appalachian Coals, Inc., is a coal-selling agency or- [fol. 273] ganized by the 137 producing defendants to sell the coal which they produce. They own the agency's entire capital stock, which is apportioned among them in proportion to their productive capacity. By contracts which they have executed with the agency, the latter is given the

*See defendants' Exhibit 1, table 6, and defendants' Exhibit 9.

exclusive right not only to sell all the coal which they produce but also to fix the prices at which same shall be sold. Orders for coal obtained by the agency are to be apportioned among them in the event that it is not possible to sell their entire production. The agency is to receive a commission of 10 per cent for making sales and is to guarantee accounts. Sub-agents are to be appointed by the agency and are to receive 8 per cent on sales from the commission allowed the agency. Any stockholding producer may direct the appointment of sub-agents to sell the product of his mines for the agency and any stockholder not exercising this privilege is required to subscribe to a larger percentage of the preferred stock of the agency. Sub-agents are to sell the coal of the producer at whose instance they are appointed; and, notwithstanding the agreement as to pro-rating orders, it is understood that coal sold to be delivered by a certain producer is to be delivered by him. It does not appear with certainity how this is to be reconciled with the agreement for pro-rating; but it is certain that no producer is to sell except through the agency and that the agency is to fix the prices at which all sales are to be made.

The prices at which coal is to be sold are to be fixed by a board composed of the president and the vice-presidents of the agency. This board is to stay at the central office of the agency and is to fix prices from time to time at which the coal of defendants is to be offered; and it is contemplated that prices are to be fixed with reference to the market price of coal so as to sell as nearly as possible all the coal that defendants can produce and to secure for same the highest prices obtainable. No contract for de- [fol. 274] livery exceeding sixty days in the future is to be binding upon any producer unless he agrees to it; but, with this exception, the agency is to have the power to close contracts at whatever price it may fix.

This selling agency has not yet begun to operate. It was organized early in the year 1932 and contracts were entered into with the producing defendants continuing until April 1, 1935 and thereafter from year to year. Before defendants began operating through the agency, however, they called the attention of the Department of Justice to what they were proposing to do. Although, for the reasons hereafter stated, we think the plan violative of the Sherman

Act, it is but due to defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices and the inroads of competing industries.

The evidence before us discloses that the condition of the coal industry for many years has been indeed deplorable. During the World War and for a short while thereafter conditions led to an over-development of mine capacity, with the result that to meet a demand of less than 500,000,000 tons the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons. In addition to this, the demand, which formerly doubled every decade, has been seriously affected as the result of more efficient methods in the burning of coal and the increasing use of hydro-electric current and of substitute fuels, such as petroleum and natural gas. Competition within the industry has become very fierce, being based in many instances, not upon the conditions of the trade, but upon the necessities of the producer. The increase in the screening of coal, which the efficient use of coal has developed in recent years, has added to the troubles of the producer, as it results [fol. 275] in coal of sizes which have not been sold being loaded in railroad cars at the same time as sizes that have been sold. This unsold coal, tends to clog the yards and shut down the mines. If shipped out to clear the yards, it will go on demurrage if not sold promptly, and must then be sold as "distress" coal for any price obtainable. Another practice which has added to the troubles of the producer is the offering of the same coal through different sales agents, a practice which results in fictitious pyramiding of supply with resulting depression of the market. Other hurtful practices have developed which, with the over-expansion of productive capacity and the inroads of competing industries, have resulted in great loss to producers, in bankruptcy and ruin to many of them, in the lowering of wages and in great suffering to communities whose means of livelihood is dependent upon coal production.

There has been much effort on the part of public authorities, as well as on the part of coal producers, to remedy these unsatisfactory conditions in the coal trade. Confer-

ences of producers have been called by the governors of states, limitation of production by state law has been proposed, and bills for production under federal license, with fixing of prices by a coal commission, have been introduced into Congress. In the Fall of 1931 meetings of the coal producers of the United States were held to consider the situation; and, as a result of these meetings, the plan of regional coal-selling agencies was evolved, each agency to handle the coal produced in a field characterized by common competitive conditions. Appalachian Coals, Inc., is the only agency which, so far, has been organized pursuant to this plan; but it appears from the testimony that the organization of similar agencies is contemplated in a number of other fields if the plan here involved is held to be lawful.

It is argued in defense of such agencies that their purpose is not to restrain trade but to promote it; that they undertake not to limit the production of any producer but [Vol. 276] to sell his production; that they will eliminate wasteful and ruinous practices such as the dumping of no-bill coal and pyramiding; that they will reduce selling costs; that they will promote more efficient and correct grading; that they will conduct scientific investigation which will result in the more efficient and more extensive use of coal; that they will be able to carry on, and will carry on, more effective advertising and selling campaigns; that they will be better able to meet the competition of petroleum, natural gas and water power; and that they will furnish as among themselves more intelligent and more effective competition—competition based upon an intelligent view of the market conditions and not upon the necessities of the individual producers. With respect to the elimination of competition, it is said that only the cut-throat price competition among the individual members will be eliminated, and that there will remain competition between different grades of coal and competition among the members even as to price, as the various producers will bring pressure upon the organization to fix prices at which their coal can be moved. It is said, also, that the agency will be powerless to fix the market price of coal because of the competition of other selling agencies and of outside producers, who control a substantial part of the actual output and a larger part of the productive capacity of the district.

The arguments thus made are impressive, but an examination of the cases decided under the Sherman Act will show that they are typical of the arguments made in favor of co-operation as distinguished from that free competition which it was the purpose of the act to preserve. After all of the benefits for which defendants argue have been considered and given due weight, there is no escaping three outstanding facts: (1) that their plan will necessarily eliminate competition as to price between the producers who are members of the organization; (2) that the prices at which their coal will be offered for sale will be fixed by [fol. 277] the selling agency which represents all of them; and (3) that, although the agency will not be able to fix market prices or establish monopoly control in the markets in which it sells, the volume of coal which it will handle is so great that the elimination of competition among those who produce it, and the power to fix uniform prices at which it will be offered for sale, must necessarily affect market prices. It is said that this elimination of competition and any consequent effect on prices is but incidental to the proper purposes of the organization, as in the case of the U. S. Steel Corporation or the International Harvester Company. But it is clear, we think, that these are not incidental, but are the very crux of the plan. It is upon the elimination of competition among the individual producers and the unified control given in offering their product upon the market, that the whole plan is predicated. And, while the influence upon the market of a large individual producer may properly be said to be incidental to the volume of its product, it is clear that the influence upon the market of such a combination as that with which we are dealing would result solely from the combination itself.

The question which thus arises for our consideration is whether an organization of producers engaged in interstate commerce, who have not through this organization obtained monopoly control of the market, but who control a substantial part of the product sold therein, is violative of the anti-trust act, where it appears that such organization eliminates competition among the member producers and is clothed with power to fix prices at which sales will be made by them. To answer this question we must give considera-

tion to the provision of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, 15 U. S. C. A. 1-7), the history* of that enactment and the decisions interpreting it. Its ap- [fol. 278] plicable provisions are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Section 2. Every person who shall monopolize, or attempt to monopil-ze, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The primary purposes of this enactment was to guard against monopolization of industry and the suppression of free competition. In England our ancestors had struggled with monopolies granted by the Crown; but from the beginning of our national existence we had accepted the laissez faire doctrine of unrestricted competition for the relationship between the state and industry, Competition was relied upon to hold prices within a reasonable range of the cost of production and to insure the investment of the social capital in enterprises reasonably profitable. But during the Seventies and Eighties the unrestricted competition of

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*For history of the act and interesting comments on the leading decisions under it see Jaffe and Tobriner "The Legality of Price Fixing Agreements" 45 Harvard Law Review 1164; Robert L. Raymond "The Federal Anti-Trust Act" 23 Harvard Law Review 353, and "Standard Oil and Tobacco Cases" 25 Harvard Law Review 31.

laissez faire was in a fair way of destroying itself. Ruthless and unfair competition had led to the creation of gigantic enterprises which were able to crush competitors and obtain a monopolistic control over trade; and it was feared that the evils which had been experienced from government monopolies were to be expected from them. It was [fol. 279] thought that they would result in lowering the efficiency of industry and in the enaction of unfair prices, fixed not with relation to the cost of production but with a view of obtaining the maximum monopoly revenue. And there was fear that the wealth of the country would be concentrated in the hands of a few, with want and economic serfdom on the part of the many. It was thought, also, that the remedies of the common law could not be invoked to curb or punish restraints or monopolization of trade occurring in interstate commerce; and so the Sherman Act was passed to guard such commerce from monopolization and to preserve the regulative force of the free play of competition.

It will be observed that the act itself draws no distinction between loose combinations resulting from agreements between independent dealers and the combination which results from normal corporate organization. It is clear, however, that the distinction must be drawn when the rule of reason laid down by the Supreme Court is applied; and much confusion in thought has resulted from failure to draw it. While monopolization or attempt to monopolize or unreasonably restrain trade is a violation of the act whether resorted to by a single corporate organization or by agreement between independent dealers, mere size is not a violation and the elimination of competition incidental to normal corporate organization is not to be condemned. Attempts to obtain monopoly control, to eliminate competition, or to effect any other undue restraint of trade, are condemned whatever the form which the attempt may take; and agreements between independent dealers, the purpose or effect of which is to eliminate competition among themselves and fix common selling prices unquestionably restrain trade and they are condemned as unreasonable restraints because tending the evil of monopoly control. The philosophy underlying the distinction is well stated by the [fol. 280] late Judge Rose in United States v. American Can Co. 230 Fed. 859, 902, as follows:

"The problem presented by size and power is one of such far-reaching difficulty that Congress has said, while it does not see how to deal with them when acquired in the legitimate expansion of a lawful business, it will prevent their illegitimate and unnatural acquirement by any attempt to restrain trade or monopolize industry. Perhaps the framers of the Anti-Trust Act believed that, if such illegitimate attempts were effectively prevented, the occasions on which it would become necessary to deal with size and power otherwise brought about would be so few and so long postponed that it might never be necessary to deal with them at all."

For a considerable period after the passage of the act, the view was widely entertained that it forbade all restraints of trade resulting from agreements between independents, but had no application to corporate organizations. The Supreme Court in the Northern Securities Case (193 U. S. 197), however applied it to the case of a holding company which took over the controlling interest in the capital stock of two competing railroads. The question which then arose in the public mind was whether the effect of this decision would not be to throttle the growth of industry in the United States. Purchase of the business of competitors was a normal incident in the growth of business; and, if an organization was to be condemned because of the combination resulting from the acquirement of a competing business, an effective obstacle to normal growth and development was interposed. This question was answered in the Standard Oil and American Tobacco Cases, 221 U. S. 1 and 106. In these the Supreme Court laid down the celebrated "Rule of Reason", holding that only acts, contracts, agreements or combinations which operated to the prejudice of the public interest, by unduly restricting competition or the due course of trade, were forbidden by the act.

This rule of reason, as it applies to corporate organization, has been clarified in the later cases of U. S. v. U. S. [fol. 281] Steel Corporation 251 U. S. 417 and U. S. v. International Harvester Co. 274 U. S. 693, which hold that mere size or unexerted power on the part of a corporation does not constitute a violation of the act. Corporate organization to be condemned must be exercising or attempting to exercise monopolistic control over the market, or attempting to unreasonably restrain trade by the elimination of com-

petition or otherwise. In the International Harvester Case, the Supreme Court, after commenting on the fact that the Harvester Company had not attempted to dominate the industry by the compulsory regulation of prices, although its prices had been followed by many of its competitors, said:

"The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. United States v. Steel Corporation, 251 U. S. 417, 451. And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. United States v. Steel Corporation, supra, 448."

The contention of defendants is that the rule of the Steel and Harvester Cases should be applied to their selling agency, and that, as it has not acquired and is not seeking to acquire the power of monopolistic control over prices, or to eliminate competitors, it ought not be held a combination in unreasonable restraint of trade. They contend that the law should recognize no distinction between corporate organizations, such as the Steel corporation or the International Harvester Company, and combinations such as their selling agency, resulting from agreements between independent dealers; and that the latter, just as the former, ought not be held violative of the statute, unless resulting in monopolistic control of the market, or unless accompanied by unfair practices for eliminating competitors or a purpose [fol. 282] to achieve monopolistic control or to affect prices by the elimination of competition. There is a vital distinction in principle, however, between a bona fide corporate organization resulting from normal growth and development, and an agreement eliminating competition between independent dealers; and the distinction is so clearly recognized in recent decisions of the Supreme Court that we have no choice but to follow them.

Corporate organization is oridinarily the product of natural economic forces; and so long as there is no intention to monopolize control of the market or unreasonably to restrain trade, there is no substantial danger of injury to

the public or reason for interference by the state. Such organizations have grown large ordinarily because the economic law of increasing returns is operative—because internal economies and the elimination of duplication and waste make operation on a large scale more profitable than in small units. So long as no unfair practices are adopted for the purpose of eliminating competitors, competition either actual or potential can be depended upon to hold prices within a range that is fair, and the public will not suffer as a result of the organization. In addition to this, there is the practical consideration that, where a corporation has grown large by natural processes, even though absorption of competitors be involved, it is almost a matter of impossibility to dissolve it without injury to the public interest. No method of "unscrambling eggs" has as yet been discovered.

Combinations of independent producers, on the other hand, organized to fix uniform prices for the sale of their products or to eliminate competition among themselves, are artificial agreements designed to limit the operation of natural economic laws—to eliminate the competition between dealers, upon which, as we have seen, the public relies for the maintenance of reasonable prices, efficient operation of industry and economical investment of capi- [fol. 283] tal. As pointed out by Judge Rose in the American Can Company case, supra, they are forbidden because of their tendency toward monopolistic control. In dealing with such combinations, moreover, the courts face no such difficulties as in dealing with corporate organization where the fusion of interests has become a fact accomplished. The free competition which it is the policy of the law to promote, can be restored by the simple expedient of forbidding the independent dealers to operate under their agreement.

This is not to hold that the rule of reason has no application to such loose combinations. We think that it does apply to them and that in its application they will not be condemned where they have no intent to eliminate competition or affect prices and control no substantial part of the trade in their market. An exclusive selling agency, for instance, would not be condemned, in the absence of an actual intent to eliminate competition and affect prices, if it represented only a few producers and

was without power to that end. Where the parties to such a combination control a substantial portion of the trade, however, the unified control arising from such combination will necessarily affect prices, not only as a result of the elimination of competition between the members themselves, but also because of the position of leadership and influence in the trade which the combination will acquire. Consequently it is uniformly held that where a number of dealers control a substantial part of the trade in a market, make any agreement to eliminate competition among themselves or to fix uniform prices is per se unreasonable and contrary to the statute.

Before the decisions in the Standard Oil and Tobacco cases were rendered, the Supreme Court had held that contracts to eliminate competition through price-fixing agreements were violative of the act, without regard to whether competition was entirely suppressed or monopoly control of the market attained. U. S. v. Trans-Missouri [fol. 284] Freight Association 166 U. S. 290; U. S. v. Joint Traffic Association 171 U. S. 505; Addyston Pipe & Steel Co. v. U. S. 175 U. S. 211; Dr. Miles Medical Co. v. Parke & Sons Co. 220 U. S. 373. The Addyston Pipe & Steel Company case involved an agreement by six manufacturers of cast iron not to compete with each other in bidding upon contracts. In this case the Court said:

"Total suppression of the trade in the commodity is not necessary in order to render the combination one in restrain of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

An examination of the opinion rendered in this case in the Circuit Court of Appeals (U. S. v. Addyston Pipe & Steel Co. (C. C. A. 6th) 85 Fed. 271) where it was heard before Justice Harlan and Judges Taft and Lurton, shows that, so far as it affected the question as to whether the stifling of competition between competing dealers was to be held a violation of the act notwithstanding effective outside competition, it is very similar to the case at bar. Judge Taft thus stated the argument for the defendants in that case (85 Fed. 279):

"The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; [fol. 285] *that competition was not stifled by the association because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.*" (Italics ours.)

After a most comprehensive review of the authorities, the Court rejected this argument, holding that such an agreement was unreasonable at common law because of its restraint of free competition and its tendency towards monopoly, saying:

"Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restrain of trade, and tending to a monopoly."

That the rule condemning contracts to eliminate competition between independent dealers through price-fixing agreement was not modified by the Oil and Tobacco cases was made clear in the case of United States v. Union

Pacific R. R. 226 U. S. 61, decided shortly afterwards. In that case the Court quoted with approval the following passage from the opinion of Mr. Justice Harlan in the Northern Securities case:

"In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause [fol. 286] of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

And referring to the decision in the Oil and Tobacco cases, the Court said:

"In the recent discussion of the history and meaning of the act in the Standard Oil and Tobacco Cases this court declared that the statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished, and in those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule and there was no suggestion that they had not been correctly decided."

More recent cases in the Supreme Court have enforced and clarified the rule and leave no doubt as to its application to the case at bar. The case of American Column and Lumber Company v. United States 257 U. S. 377 involved the so-called "open competition agreement." The defendants were manufacturers of hardwood who controlled only 5 per cent of the hardwood mills and about one-third of the hardwood production of the United States. They were combined in a trade association which furnished statistics to its members as to production and supplies on hand, together with statements as to prices charged by the various members and predictions as to future market prices.

Notwithstanding the absence of any agreement not to compete with each other or to observe uniform prices, the Court held the plan violative of the statute because of its tendency toward the elimination of competition and the adoption of such prices. The language of the opinion leaves no doubt that any arrangement restricting free competition or restraining the natural flow of trade in interstate commerce is unreasonable and condemned by the statute. The Court said at page 400:

[fol. 287] "It has been repeatedly held by this court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the act and is unlawful.

"In Northern Securities Co. v. United States, 193 U. S. 197, 337 it is declared that:

" 'In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce.'

"In United States v. Union Pacific R. R. Co. 226 U. S. 61, 87, decided in 1912, long prior to the forming of their combination by the defendants, the law was condensed into this expression:

" 'To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.'

"And in Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600, 609, it was said:

" 'It (the Sherman Act) broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce.' "

Concerning the "plan" before the Court, it was said:

"Such close cooperation, between many persons, firms, and corporations controlling a large volume of interstate

commerce, as is provided for in this 'Plan' is plainly in [fol. 288] theory, as it proved to be in fact, inconsistent with that free and unrestricted trade which the statute contemplates shall be maintained. * * * Convinced, as we are, that the purpose and effect of the activities of the 'Open Competition Plan' here under discussion, were to restrict competition and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in curtailing production and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-Trust Act of 1890 (26 Stat. 209) and the decree of that court must be affirmed."

Certainly if an agreement is to be condemned, where there is no express fixing of prices or elimination of competition, merely because of the intention to this effect found to be back of it, an agreement expressly limiting the right of independent dealers to sell in competition with each other and delegating to a selling agency the right to fix prices at which sales are to be made, cannot upon any theory be sustained.

In United States v. American Linseed Oil Co. 262 U. S. 371, the open competition plan was again before the Court. In again condemning it, the Court said:

"We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties."

In Cement Mfrs. Association v. United States, 268 U. S. [fol. 289] 588, 604-5, the Court in sustaining the validity of a trade association which merely collected and distributed trade data to its members, said:

"Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined."

Finally in United States v. Trenton Potteries Co. 273 U. S. 392, the Court dealt with an agreement, on the part of those controlling over 80 per cent of the business of manufacturing and distributing sanitary pottery in the United States, to fix and maintain uniform prices. The trial court refused to charge the jury that to convict the defendants they must find that the agreement was an unreasonable restraint of trade and commerce, but charged that, if they found that the agreement was made as alleged, they should convict the defendants without regard to the reasonableness of the prices fixed or the good intentions of the combining units. This action was approved by the Supreme Court. The Court said with respect to the purpose of the Sherman Act to maintain free competition (p. 397):

"Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained compet-ive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."

And with respect to price-fixing agreements it was said:

"Beginning with United States v. Trans-Missouri Freight [fol. 290] Association, supra; United States v. Joint Traffic Association, 171 U. S. 505, where agreements for establishing reasonable and uniform freight rates by competing lines of railroad were held unlawful, it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or busi-

ness in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon."

A case directly in point on the principle here under discussion, and one cited with approval by the Supreme Court in the Trenton Potteries case is Poultry Dealers Association v. United States (C. C. A. 2d) 4 Fed. (2d) 840, a decision by Judges Rogers, Hough and Learned Hand. The combination there involved was one between buyers of live poultry in New York City. It appears that there were about 300 buyers of poultry in New York and that about 178 of these joined the association. The members of the association appointed a committee of seven who were daily to treat with commission men, and after negotiation, with an eye on supply and demand, to establish a price for the day, which should obtain as to all purchases made by any member of the association. The reason given for the formation of the association was the demoralized condition of the market, "fake" or "wash" sales, frauds upon buyers, and the hope that by "stabilizing" prices there might be given buyers and sellers a reliable guide by which to deal and thus eliminate opportunities for bad trade practices. There was no suggestion that the association had the power of "monopoly control" over the market or that it could fix market prices. In holding the combination violative of the Sherman Act, the Court, speaking through Judge Learned Hand, said:

"As to the second point, it is somewhat surprising at this day to hear it suggested that a frank agreement to fix prices and prevent competition as regards them among one-half the buyers in a given market may be defended, on the [fol. 291] notion that the results are economically desirable. We should have supposed that, if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market. The suggestion is that, since Standard Oil Co. v. U. S. 221 U. S. 55, such a combination may be justified, if some prejudice to the public be not shown. That might be the law, but we do not so understand it. * * * Among those trade practices which fall within the statute, none we think is more typical than an agreement of a sub-

stantial number of either buyers or sellers to fix the price at which alone all members of the group will trade."

There can be no question in the case at bar but that the defendants control, not only a substantial part of the coal produced in the field in which they operate, but also a substantial part of the coal sold in practically every market in which they sell. While there is substantial competition to be met in each market and defendants will not through their sales agency be able to exercise monopolistic control of the market, it is clear that the control in the selling agency of the vast quantity of coal which they sell will necessarily affect prices. The selling agency will not be able, we think, to fix the market price of coal; but it is empowered to fix the price at which these producers will sell and to refuse to sell at offers less than that price, and this power must inevitably affect the market. We have, then, an organization of dealers controlling so substantial a part of the product sold in a market as to affect market prices. And we have an agreement among these dealers that they will not sell in the market except through a common agency and will allow that agency to fix the prices at which sales may be made. This is clearly an agreement to eliminate competition and fix uniform prices by dealers controlling a substantial part of the trade, which as we have seen under the authority of the cases cited is forbidden by the Sherman Act.

[fol. 292] A case almost on all fours with the case at bar is Chesapeake & Ohio Fuel Co. v. United States (C. C. A. 6th) 115 Fed. 610, decided by Judges Lurton, Day and Severens, with opinion by Judge Day, later of the Supreme Court. While the case was decided before the Supreme Court announced the "Rule of Reason" in the Oil and Tobacco cases, it proceeded upon principles which, as we have seen above, were not affected by the decisions in those cases. Like the case at bar, it involved an exclusive selling agency with power to fix selling prices. Only fourteen coal companies were represented by the agency and the amount of their production was only 5,000 tons per day or approximately a million and a half tons a year, as compared with more than fifty-eight million tons a year produced by these defendants. The same arguments were made there as here, viz., that the main purpose of the agreement was "to in-

crease the trade of the parties, to enhance competition in a larger field and to improve the character of the product." These arguments were rejected, however, and the combination was held violative of the Sherman Act. With respect to the argument that the agency controlled so small a quantity of coal as not to affect prices, the Court said:

"It is further contended that the competition is such in the market for which this coal is intended, and the coal produced by the operators, parties to this agreement, is such a small fraction of the quantity sold, that it cannot affect prices materially. It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement. In U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, Chief Justice Fuller said: 'Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition.' Quoted with approval in the Addyston Case, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136.

[fol. 293] "The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge 'trust' which shall control the production and sale of a commodity."

What the court said with reference to a feature of the contract restricting the right of the agency thus to purchase from others if unable to pay the minimum price fixed by the committee of producers, i. e. if unable to sell the coal at the price fixed, is very pertinent here, when it is remembered that the contract here under consideration restricts the right of the producer to sell coal except through the agency. If the agency fails to sell it at the prices which have been fixed, his mines must remain idle; for he cannot sell except through the agency. The court said in this connection:

"Should the fuel company be unable in all cases to meet the price fixed, the parties are nevertheless prohibited, dur-

ing the life of the contract, from dealing with others, or selling at a less price than the committee has fixed, and the purchaser is not at liberty to deal with competitors for a supply of coal for this market. 'It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity that is regarded.' The Addyston Case, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149."

We have carefully examined the authorities upon which defendants rely, but we do not think that they are in point. The U. S. Steel Corporation case and the International Harvester Company case we have already distinguished. The Chicago Board of Trade Case, 246 U. S. 231, involved a reasonable regulation of the Board of Trade of Chicago to observe between the closing of the exchange on one day [fol. 294] and its opening on the next the closing prices determined on the day in question by open competition on the exchange. The court held the restraint thus involved reasonable on the ground that it involved a restriction merely upon the period of price-making, had no appreciable effect upon market prices, applied during only a part of the business day and to a very small part of the day's sales and within the narrow limits of its operation had helped to improve market conditions. It is manifest that what was decided there can have no application to a case such as this. Neither the Window Glass Manufacturers Case, 263 U. S. 403, nor the Maple Flooring Manufacturers Case, 268 U. S. 563, involved price-fixing or the elimination of competition. The former dealt with an agreement between manufacturers to operate their plants in such way as to utilize to best advantage a limited supply of hand labor; the latter, with an organization which gathered and disseminated statistical information for the benefit of its members, there being no evidence of any intention to fix uniform prices or eliminate competition.

For the reasons stated we think it clear that the injunction prayed should issue. It is argued with much force that organization is essential to the preservation of the coal industry, one of the basic industries of the country, and that the organization can be effected only by means of some such arrangement as that embodied in the coal-selling

agency before us; but this is an argument which addresses itself to the law-making branch of the government. Even if it be reasonable that organization be permitted because of the condition of the industry, it does not follow that the courts may uphold as reasonable an agreement or combination which the statute condemns. The argument of defendants goes not to the reasonableness of the agreement as measured by the statute, but to the reasonableness of the statute itself. We sympathize with the plight of those engaged in the coal industry, whether as operators or as [fol. 295] miners; but we have no option but to declare the law as we find it. We cannot repeal acts of Congress nor can we overrule decisions of the Supreme Court interpreting them.

If it be thought that the law should permit agreements eliminating competition as between the parties thereto and fixing as between them prices at which goods shall be sold, in cases where monopolistic control of the market is not intended and does not result, the remedy is with Congress and not with the courts.*

Decree will be entered enjoining defendants from proceeding further under their unlawful combination and from carrying out the contracts into which the producing defendants have entered with the defendant Appalachian Coals, Inc., in pursuance thereof.

Injunction granted.

CONCURRING OPINION

SOPER, Circuit Judge, concurring:

The defendant coal producers take the view that their proposal is outside the scope of the Sherman Act because

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*For recent articles dealing with proposed legislative changes in the Anti-Trust Act, see Jaffe and Tobriner, "The Legality of Price-Fixing Agreements", 45 H. L. R. 1164, 1192, and "Anti-Trust Laws and Self Regulation of Industry" by Professor John Dickinson, Journal of American Bar Association, vol. 18, p. 600.

it involves a plan to rescue a basic industry from disaster. They emphasize the fact that Appalachian Coals, Inc., their common sales agent, although empowered to fix the price of the coal mined by them, would not be able to monopolize the market or exact exorbitant prices from the consuming public; and they contend that the activities of the organization would be so beneficial to the general welfare, that the restraint of trade incidentally involved could not be considered undue or unreasonable in the eye of the law. On this ground chiefly they seek to distinguish this case from such decisions involving trade organizations as American Column Lumber Company vs. United States, 257 U. S. 377; United States vs. [fol. 296] American Linseed Oil Co., 262 U. S. 371; United States vs. Trenton Potteries Co., 273 U. S. 392; Poultry Dealers Assn. vs. U. S., 4 F. (2d) 840.

The pronouncement of the courts that the Sherman Act was designed to forbid only unreasonable or undue restraints of trade has led to the contention that a restraint based on sound economic theory and devised in the interest of the general public is not within the prohibition of the statute; and this position finds increased support at a time like the present when productive capacity far exceeds buying power, and some restraint upon production seems desirable. We must regulate production, it is said, by some control, voluntary or governmental, with reference to the ability of the public to absorb the product; and in like manner we must hold prices above the cost of production so as to stabilize industry and ensure a fair return to the capital and labor employed. So, the defendants say that since they are unable to conduct their business successfully under prevailing competitive conditions, they should be allowed to introduce a form of group control.

This argument confounds theories held in academic or business circles with the underlying purpose of the federal statutes. Economists themselves are not agreed as to whether these acts are suited to modern affairs. But even if enlightened opinion were unanimous that each major industry should be conducted under a central control, governing the actions of individuals in such matters as price or production, our decision of necessity would be the same. What is a reasonable restraint of commerce may not be determined for us by private authority. Our view must conform to the recognized purpose of the present law that

competition shall be free. The establishment of controls over production and price is the antithesis of this economy; and it is the province of Congress and not of the courts to decide which shall prevail.

[fol. 297] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

In Equity. No. 1

UNITED STATES OF AMERICA, Petitioner,

versus

APPALACHIAN COALS, INCORPORATED, et al., Defendants

FINAL DECREE—Filed and entered October 17, 1932

This cause coming on to be heard before the undersigned constituting a Special Court convened pursuant to 15 U. S. C. A. 28 to hear the application of the United States for an injunction to restrain defendants from alleged violations of the Sherman Act; and being heard upon the pleadings, exhibits and evidence of witnesses taken in open court; and the Court having found the facts and announced its conclusions of fact and law as appears in the written findings of fact and conclusions of law filed herewith:

Now, therefore, for the reasons stated in the opinion of the Court herewith filed, it is considered and adjudged that Appalachian Coals, Inc. constitutes an unlawful combination in restraint of trade in violation of the Sherman Anti-Trust Act, that the contracts entered into between Appalachian Coals, Inc. and the other defendants and between Appalachian Coals, Inc. and the sub-agents for the selling of coal were and are contrary to law and void; and it is ordered, adjudged and decreed that the defendants, their officers, agents and servants be, and they hereby are, restrained and enjoined from proceeding further under the charter of Appalachian Coals, Inc. or under the contracts entered into by said corporation, and that the defendants be, and they hereby are, directed to dissolve said corpora-
[fol. 298] tion and to surrender its charter.

Done at Richmond, Va., this the 17th day of October, 1932.

John J. Parker, Elliott Northcott, Morris A. Soper, United States Circuit Judges, Sitting in the District Court of the United States for the Western District of Virginia.

[fol. 299] In United States District Court

[Title omitted]

Stipulation re Statement of Evidence—Filed October 17, 1932

It is hereby stipulated and agreed between the parties hereto that the statement of evidence in narrative form which is attached hereto be approved as being a true, complete and properly prepared statement of evidence received on the trial of said cause, and that the same be substituted for the statement heretofore lodged with the Clerk of this Court.

John Lord O'Brian, Solicitor for United States of America. Edgar L. Greever, William J. Donovan, Solicitors for Defendants.

Dated October 17, 1932.

[fol. 300] In United States District Court

Narrative Statement of the Evidence—Filed October 17, 1932

(Note.—Figures in parenthesis indicate pages in the original transcript of the evidence.)

Offers in Evidence

Counsel for the United States offered in evidence five stipulations entered into between the petitioner and the defendants. These stipulations were received in evidence as Government Exhibits 1, 2, 3, 4 and 5 (69, 70, 70, 73, 74).

The first stipulation, received in evidence as Government Exhibit 1, set forth the steps which had been taken to organize regional selling agencies in bituminous coal producing districts outside of the territory served by Appalachian Coals, Inc. In this stipulation the defendants reserved the right to object to its admissibility upon the ground of relevancy and materiality. Counsel for the defendants objected to the admission of this stipulation upon the ground that the facts therein stated are immaterial and irrelevant to any issue raised by the petition and answer, and upon the further ground that the action taken by producers in other districts can in no way be binding upon the defendants because there was nothing in the stipulation to show that what was done in any of these other districts was done in conjunction with the action of the defendants (69). The court overruled this objection and allowed defendants an exception (68).

Counsel for the United States stated with reference to the second stipulation, received in evidence as Government Exhibit 2, that it purported to set forth for each of the years 1929, 1930 and 1931 the bituminous coal production of each defendant producer in Appalachian territory, classified according to the destinations or markets to which it was sent or in which it was sold; that the defendants had obtained this information, but had been unable to furnish complete information; that the next to the last column headed, "Not classified", represented production as to which defendants' counsel had been unable to obtain information concerning destinations or markets (70).

[fol. 301] With reference to the fourth stipulation, received in evidence as Government Exhibit 4, counsel for the United States stated that the index figures therein given for the average sales realization price f. o. b. mines for bituminous coal were based upon sales realization prices for the entire bituminous coal industry in the United States (73).

A stipulation between the parties that the case might be tried at Asheville, North Carolina, was filed with the clerk of the court (74).

(76) FREDERICK G. TRYON, a witness called on behalf of the petitioner, being first duly sworn, testified:

Direct examination.

By Mr. O'Brian:

I am the head of the Statistics Section of the Coal Division of the United States Bureau of Mines. The Statistics Section runs an information service for the benefit of producers and consumers of coal. It covers only matters that can be established by quantitative measurement and only points that can be obtained by voluntary cooperation of the industry. The Coal Division has no compulsory power to require producers or consumers of coal to furnish data. (77) Because of this voluntary cooperation, it is impossible for the Division to deal with controversial subjects, such as freight rates, labor conditions, etc., and it is chiefly concerned with the measurement of supply and demand and of other factors that influence long-time trends of the market and that, perhaps, may serve both buyer and seller as a guide to long-time policy and the planning of investments. The Coal Division regularly publishes statistics for the information of the public and the coal industry, both current market information and annual reports that attempt to develop long-time trends.

I have been with the Statistics Section of the Coal Division since its organization in 1925. Before that time I [fol. 302] was with the United States Geological Survey engaged in similar work for a period of six years.

Since all the data collected by the coal statistics section are obtained by voluntary co-operation and since the purpose of the organization is to measure only those things that can be established beyond dispute by the application of statistical methods, it is extremely important that any testimony we may give be limited to the presentation of the statistical data themselves or those things that can be immediately deduced therefrom. This is the uniform policy of this branch of the Bureau of Mines. If this data succeed in laying an effectual background for the consideration of this case, we shall be pleased indeed, but I have the strictest instructions from my director to abstain from any expression of opinion and to confine my testimony to statistical records or the data that could be derived therefrom.

(78) Bituminous coal is found in some thirty different States and is produced in substantial quantities in some twenty-six States. The largest single source of bituminous coal in this country is the great Appalachian region extending from northern Pennsylvania into Alabama. Other districts of large importance are the Eastern Interior field, which embraces Illinois, Indiana and western Kentucky; the Western Interior field, which embraces the tier of States running from Iowa south to Texas, with some breaks; and the Rocky Mountain fields, which contain an enormous reserve of coal, but which at the present time are relatively small producers because of the limited market accessible to them.

There are some deposits of low volatile bituminous coal in the West, but the great bulk of the country's production of low volatile coal comes from a belt of fields along the eastern flank of the Appalachian region. Low volatile coal is produced in large quantities in Pennsylvania and a continuation of the Pennsylvania deposit south into Maryland and southern West Virginia, overlapping the State of Vir-
[fol. 303] ginia. (79) This coal is often called Smokeless coal. In 1929, the total output of low volatile coal was approximately 99,000,000 tons, of which something like 57,000,000 tons came from the southern group of fields—Pocahontas, Tug River, New River and Winding Gulf—and the balance, somewhat ill-defined, from central Pennsylvania, Maryland and adjacent districts. Low volatile coal represents a little less than one-fifth of the bituminous coal production in the United States, and it is roughly equal in tonnage to the output of the territory, or the fields embraced, as I understand it, by Appalachian Coals, Inc.

(80) Substantially all of the coal mined west of the Mississippi River is consumed west of the Mississippi River, a few occasional cars of this coal moving east of the river.
[fol. 304] In 1929 approximately 17% of the bituminous coal production in the United States was made into coke. I have prepared a tabulation based upon the statistics of the Bureau of Mines showing the consumption of coal in by-product ovens of the United States, classified as between low volatile coal, high volatile Appalachian coal, and all other high volatile coal. (81) The tabulation was prepared under my direction, and I am satisfied as to its substantial accuracy.

The tabulation was thereupon offered and received in evidence as Government Exhibit 6.

(82) This tabulation covers the by-product coke oven consumption for the years 1928, 1929 and 1930. The great majority of coke oven plants reporting to the Bureau of Mines the sources of their coal, indicated that they produced coke by a mixture of low and high volatile coals, the proportions apparently varying according to the type of coal they are using and according to the type of coke they wish to produce. Some coke ovens report that they use only high volatile coal. (86) The second column includes the high volatile coal used in these coke ovens which was produced in the high volatile fields of eastern Kentucky, southern West Virginia, Virginia and Tennessee, which substantially and for all practical purposes coincides with what is described in the petition as Appalachian territory. The record that we have of the origin of coal charged in coke ovens does not always state the precise field in this area from which the coal was derived. The next column includes all the high volatile coal from other fields used in the manufacture of coke in these three years, and the last column the total high volatile coal used in the by-product coke oven industry. The sub-heading, "Per cent", under the second column shows the per cent of the total quantity of high (87) volatile coal charged in by-product ovens coming from territories served by Appalachian Coals, Inc., and, taking the State of Michigan for the year 1930 as an example, shows that 78.5% of the high volatile coal charged [fol. 305] in the coke ovens in Michigan in that year was coal produced in the territory served by Appalachian Coals, Inc.

The tabulation includes all of the coal charged in coke ovens, whether produced by captive or non-captive mines. A captive mine is one owned or controlled by a consumer of coal. It is more or less a slang phrase which (88) graphically describes the condition. It usually relates to large manufacturers, such as steel plants, railroads, public utilities, some other manufacturers and an occasional retailer.

I have prepared a tabulation showing the coal consumed in 1928 by electric public utilities in the generation of electric power, classified as between coal received from the

high volatile fields of eastern Kentucky, southern West Virginia, Virginia and Tennessee and that received from all other fields. The tabulation was compiled in the office of the United States Geological Survey from signed statements submitted by all of the electric public utility plants. I was consulted about its preparation and can vouch for its accuracy. The tabulation was then offered and received in evidence as Government Exhibit 7.

(89) The heading in this tabulation, "High volatile fields of Eastern Kentucky, Southern West Virginia, Virginia and Tennessee", embraces substantially the territory described in the petition in this case as Appalachian territory. The tabulation shows, by States, what percentage of the total 1928 coal consumption of electric public utilities was coal produced in Appalachian territory.

I have prepared from the records of the Bureau of Mines a table showing the per cent that bituminous coal, anthracite, fuel briquets, fuel oil, natural gas (except that used for carbon black) and hydroelectricity formed of the total consumption of energy from these various sources in eleven States for the year 1929. I have also prepared a tabulation showing the approximate per cent that these same fuels and hydroelectricity formed of (90) the total energy consumed in 1929 by all manufacturing establishments in the same [fol. 306] eleven States. These two tabulations were offered and received in evidence as Government Exhibit 8.

In the tabulations in Exhibit 8 the consumption of other forms of energy has been translated into an equivalent tonnage of bituminous coal. For example, Table I of Exhibit 8 shows that, for the States of Illinois and Indiana combined, 5.2% of the total energy consumption was from fuel oil. (91) This information is based on a survey of fuel oil distribution made by the United States Bureau of Mines through its Division of Petroleum Economics. From reports obtained from the distributors of fuel oil, it was ascertained that the total quantity of fuel oil and gas oil delivered for all purposes within the State of Illinois, except for railroad fuel and bunker oil, if any, amounted to 12,889,701 barrels, and that the total quantity, similarly defined, going into the State of Indiana was 5,405,305 barrels. That quantity of fuel oil has been translated into a rough equivalent of coal on the assumption that 4.2 barrels of fuel oil are equal to a ton of coal. All conversions of this

The tabulation was thereupon offered and received in evidence as Government Exhibit 6.

(82) This tabulation covers the by-product coke oven consumption for the years 1928, 1929 and 1930. The great majority of coke oven plants reporting to the Bureau of Mines the sources of their coal, indicated that they produced coke by a mixture of low and high volatile coals, the proportions apparently varying according to the type of coal they are using and according to the type of coke they wish to produce. Some coke ovens report that they use only high volatile coal. (86) The second column includes the high volatile coal used in these coke ovens which was produced in the high volatile fields of eastern Kentucky, southern West Virginia, Virginia and Tennessee, which substantially and for all practical purposes coincides with what is described in the petition as Appalachian territory. The record that we have of the origin of coal charged in coke ovens does not always state the precise field in this area from which the coal was derived. The next column includes all the high volatile coal from other fields used in the manufacture of coke in these three years, and the last column the total high volatile coal used in the by-product coke oven industry. The sub-heading, "Per cent", under the second column shows the per cent of the total quantity of high (87) volatile coal charged in by-product ovens coming from territories served by Appalachian Coals, Inc., and, taking the State of Michigan for the year 1930 as an example, shows that 78.5% of the high volatile coal charged [fol. 305] in the coke ovens in Michigan in that year was coal produced in the territory served by Appalachian Coals, Inc.

The tabulation includes all of the coal charged in coke ovens, whether produced by captive or non-captive mines. A captive mine is one owned or controlled by a consumer of coal. It is more or less a slang phrase which (88) graphically describes the condition. It usually relates to large manufacturers, such as steel plants, railroads, public utilities, some other manufacturers and an occasional retailer.

I have prepared a tabulation showing the coal consumed in 1928 by electric public utilities in the generation of electric power, classified as between coal received from the

high volatile fields of eastern Kentucky, southern West Virginia, Virginia and Tennessee and that received from all other fields. The tabulation was compiled in the office of the United States Geological Survey from signed statements submitted by all of the electric public utility plants. I was consulted about its preparation and can vouch for its accuracy. The tabulation was then offered and received in evidence as Government Exhibit 7.

(89) The heading in this tabulation, "High volatile fields of Eastern Kentucky, Southern West Virginia, Virginia and Tennessee", embraces substantially the territory described in the petition in this case as Appalachian territory. The tabulation shows, by States, what percentage of the total 1928 coal consumption of electric public utilities was coal produced in Appalachian territory.

I have prepared from the records of the Bureau of Mines a table showing the per cent that bituminous coal, anthracite, fuel briquets, fuel oil, natural gas (except that used for carbon black) and hydroelectricity formed of the total consumption of energy from these various sources in eleven States for the year 1929. I have also prepared a tabulation showing the approximate per cent that these same fuels and hydroelectricity formed of (90) the total energy consumed in 1929 by all manufacturing establishments in the same [fol. 306] eleven States. These two tabulations were offered and received in evidence as Government Exhibit 8.

In the tabulations in Exhibit 8 the consumption of other forms of energy has been translated into an equivalent tonnage of bituminous coal. For example, Table I of Exhibit 8 shows that, for the States of Illinois and Indiana combined, 5.2% of the total energy consumption was from fuel oil. (91) This information is based on a survey of fuel oil distribution made by the United States Bureau of Mines through its Division of Petroleum Economics. From reports obtained from the distributors of fuel oil, it was ascertained that the total quantity of fuel oil and gas oil delivered for all purposes within the State of Illinois, except for railroad fuel and bunker oil, if any, amounted to 12,889,701 barrels, and that the total quantity, similarly defined, going into the State of Indiana was 5,405,305 barrels. That quantity of fuel oil has been translated into a rough equivalent of coal on the assumption that 4.2 barrels of fuel oil are equal to a ton of coal. All conversions of this

character involve assumptions as to what is a typical fuel oil and what is a typical coal, and different men will use different factors. A factor of 4.2 barrels per ton is probably a satisfactory approximation to be used for the United States as a whole.

(92) Information regarding the distribution of natural gas in these States is likewise based upon an official report of the Bureau of Mines collected through its Division of Petroleum Economics. That report is derived from signed schedules turned in by the distributors of natural gas, which showed that, excluding the manufacture of carbon black, of which I believe there is none in Illinois and Indiana, the total quantity delivered to the consumers in Illinois was 3,139,000 M cubic feet, and the total quantity delivered to consumers in the State of Indiana was 2,365,000 M cubic feet. This has been translated into a rough equivalent of coal on the assumption that 25.6 M cubic feet are equal to a [fol. 307] ton of coal. Others might select different factors, but this perhaps is roughly typical for the coals of the United States as a whole and will give a reasonably satisfactory idea of the coal equivalent of the natural gas delivered in these States. After the year 1929 there was an increase in the quantity of natural gas delivered in the States of Illinois and Indiana. The latest available record covers the year 1930, and if the 1930 quantities, which were somewhat larger, were substituted for those of 1929, the percentage would increase from 6.3, as shown in the Exhibit, to 6.6, as indicated in the footnote. I point that out in order to be as fair as possible in indicating the degree to which natural gas is now available in those States.

(94) The percentages as to natural gas are based on figures collected by a division of the Bureau of Mines which has a reputation in the natural gas industry for accuracy of service. They were taken from an official publication of the Bureau of Mines, called Natural Gas in 1930.

The percentages as to water power are based on figures collected by the United States Geological Survey. It collects direct from all producers of power in public utility plants the current record of total power generated in kilowatt hours, and the source of that power, whether by fuel or water. The total number of kilowatt hours generated by water in these States has been translated into the amount of coal which would have been necessary to burn (95) in

order to develop the same amount of power, assuming the average number of pounds per kilowatt hour which actually prevailed in the operation of public utility electric power plants in the United States in 1929, that is to say, 1.68 pounds per kilowatt hour.

Another small contribution to the supply of water power arises from water wheels operated by industries themselves, not by public utilities. As to this, the information available consists of the returns of the horsepower of the installed water wheels. From that was developed the ap- [fol. 308] proximate number of horsepower hours which could have been produced by those water wheels, and that was converted into the amount of coal necessary to generate that amount of power, using a somewhat higher consumption per kilowatt hour. This method of estimating the coal equivalent of the water power generated by manufacturing or industrial establishments is obviously indirect, but it applies to an extremely small fraction of the total water power developed in the United States. (96) I used a time factor of 20 per cent, which was a reasonable assumption in the light of the common performance of such plants.

(96) The percentages as to fuel briquets are based upon complete reports from all producers of fuel briquets, showing the disposition of their product. These reports are made in writing to the Bureau of Mines, and are under my immediate supervision.

Percentages as to bituminous coal are based upon analyses of distribution of bituminous coal from the producing districts to consuming states, which figures have been used, I believe, by both parties to this cause as the basis of statements of distribution of coal from Appalachian territory and from all other fields. The figures of distribution of Pennsylvania anthracite to consuming states are obtained in a similar way, from statements submitted to me by the anthracite operators, by railroads, by lake dock operators, and from certain other sources. The resultant compilation was submitted to (97) the Anthracite Bureau, and I have their permission to publish the same as accurate measurements of distribution of anthracite.

(98) All the fuel statistics to which I have referred are systematically collected by the Bureau of Mines. The water power statistics are based upon similar returns col-

lected by the United States Geological Survey. Figures for natural gas and fuel oil distribution are probably quite as accurate as those for bituminous coal distribution. I [fol. 309] have every confidence in them and am quite willing to stake what reputation I have as a statistician on their accuracy. They are so accepted by the natural gas and petroleum industries.

I have followed substantially the same methods in compiling the percentages contained in Table II of Government Exhibit 8, entitled "Approximate Percentage of the Total Energy Consumed by All Manufacturing Establishments in 11 States that was Derived from Bituminous Coal and from All Other Sources, 1929." In this case the source of the information was the Census of Manufacturer for the year 1929. It is based on signed, written reports from all manufacturing establishments of the United States made to the Bureau of Census. These reports have been published by the Bureau of Census.

(99) The eleven states included in Government Exhibit 8 were selected as those in which the proportion of the total bituminous coal consumption derived from Appalachian territory was the largest. In the last column of the tabulations will be found the percentages of total receipts of bituminous coal in those states coming from the high volatile fields of eastern Kentucky, southern West Virginia, Virginia and Tennessee, which percentages are the same as those used on the map (subsequently received in evidence as Defendants' Exhibit 9).

(100) I have also prepared a tabulation showing the approximate percentage of the total energy consumed by manufacturing establishments in 20 leading counties of southern Michigan which was derived from bituminous coal and all other sources for the year 1929, and a tabulation showing the same percentages for the 15 leading counties in South Carolina for the same year. These tabulations were received in evidence as Government Exhibit 9 (101). The so-called leading counties are those with the largest consumption of coal or its equivalent by manufacturing industries. The sources of the information upon which these [fol. 310] tabulations were compiled are the same as those used in compiling Table II of Government Exhibit 8. The tabulations are based upon the Census of Manufactures, 1929, upon written reports submitted by the manufacturing

establishments to the Bureau of the Census, tabulated by the Bureau of Census and published by them in an official report which shows the principal types of fuel used in each county. For all practical purposes the same methods and factors were used as in Government Exhibit 8 for converting consumption of fuel oil, natural gas, water power, etc., into an equivalent tonnage of bituminous coal.

Of the total bituminous coal produced in the United States in 1929, approximately 26.2 per cent was used by the railroads as fuel, 18 and a fraction per cent by general manufacturing industries (not including coke ovens, steel works or gas works) (102), 8 and a fraction per cent in the manufacture of electrical energy, 20 per cent for what are called domestic uses (including heating of large buildings, such as apartments and hotels, and certain miscellaneous items like construction and threshing outfits, for which there is no accurate information) and 4½ per cent by steel plants for gas and steam coal, as opposed to coking coal.

(112) I have prepared a map, drawn to scale, showing the distribution of the coal produced in the territory embraced by Appalachian Coals, Inc. It is based upon the official Bureau of Mines records of distribution of coal produced in this territory, and the distribution figures upon which it is based are the same as those used in the map (subsequently introduced as Defendants' Exhibit 9). (113) The map, in addition to showing the distribution to particular states, shows the proportionate part of the production in this territory which was used as railroad fuel, the proportionate volume of tidewater shipments and the proportionate shipments consigned to the docks on the Great Lakes and called on the map "Lake Cargo." This map was received in evidence as Government Exhibit 10.

[fol. 311] I have prepared three maps showing, (114) respectively, the consumption by counties throughout the United States of bituminous coal, natural gas and fuel oil by electric public utility plants. These maps are drawn to scale. On the map relating to consumption of bituminous coal by these plants one dot is equivalent to 10,000 tons of bituminous coal, or major fraction thereof, and (115) the maps relating to the consumption of fuel oil and natural gas by these plants show respectively a dot for the consumption of fuel equivalent to 10,000 tons of coal, or major fraction thereof. The maps were received in evi-

dence as Government Exhibits (115) 11, (116) 12 and (117) 13.

The map relating to bituminous coal (Government Exhibit 11) is based on the official records of the United States Geological Survey, and was made by it in cooperation with the Bureau of Mines, and I was personally associated with it. In a number of counties the total quantity consumed is so great that they appear as solid black. In general the map indicates that the great centers of bituminous coal consumption for the generation of electric power lie in the area north of the Ohio and Potomac Rivers and east of the Missouri River. The three maps taken together show that in that area very large amounts of coal are consumed for this purpose in proportion to either fuel oil or natural gas.

The map relating to fuel oil shows one black dot for each 40,000 barrels of fuel oil, which is roughly equivalent to 10,000 tons of coal, and therefore the scale of graphic presentation is identical with that used on the coal map. The significant features developed are that the very considerable amounts of fuel oil used in the generation of electric power in public utility plants are confined largely to certain areas. There is a congregation of dots in the southwest, near the California oil fields; there are scattering occurrences of large scale use of fuel oil for power generation in the area dependent on the Midcontinent oil fields and the Gulf Coast; and along the Atlantic Coast, [fol. 312] accessible to tidewater, there is a very considerable use of fuel oil for electric power generation. (116) Counties in Massachusetts and those in Georgia and Florida are good illustrations. In order to be perfectly fair, consumption of fuel oil in these plants in quantities equivalent to less than 5,000 tons of coal have been indicated by "Xs." The great majority of those small plants are Diesel electric plants for which, of course, the consumption of oil is necessary, as coal would not suffice.

The map relating to natural gas is based on the same source of information, official records of the United States Geological Survey. In order to be perfectly fair I have used the year 1931 so as to indicate the fullest extent as yet revealed by the statistical records of the movement of natural gas into the middlewestern area. A number of the counties that are indicated as using natural gas for

generation of electric (117) power in the year 1931 were not so using it a year or two ago. In order to be perfectly fair, wherever there was a small amount of gas consumed in the generation of electric power by public utility plants, less than the equivalent of 5,000 tons of coal, this has been indicated by an "X". Some of those "Xs" indicate a very trifling amount of consumption, but they do reveal the places on the map of the United States where the owners of electric power control stations have determined, in their interest, to use natural gas rather than some other form of fuel. A similar map of distribution of natural gas for manufacturing purposes probably would show relative greater quantities consumed in the middlewestern area, but unfortunately we do not have at this time an accurate county record of such consumption of natural gas.

(103) Cross examination.

By Mr. Donovan:

(104) Production in the Ohio fields dates back to the forties or perhaps earlier. My impression is that the Ohio [fol. 313] field is considerably older than what is referred to as Appalachian territory.

In Government Exhibit 6 the percentages are based upon tons and not values in dollars. I do not know whether or not, if based on dollars, the percentages of Appalachian territory would be lower. (105) The information which [fol. 314] I have from coke companies specifies tonnage and the sources of the coal and gives the total value, but it does not show separately the value of the coal from each source. This exhibit shows that in Michigan the percentage of high volatile coal from Appalachian territory was 99 in 1928, 91 in 1929 and 78 in 1930. (106) Apart from what the exhibit shows, I do not know whether in recent years there has been a tendency toward a lesser use, on a percentage basis, of coal from Appalachian territory in the States around the Great Lakes. The exhibit shows that high volatile coal, other than coal from Appalachian territory, (107) can be used for making coke and that a very large tonnage of such other coal is so used.

Certain manufacturers of gas indicate that they make their coal gas out of western Pennsylvania coal and coal from districts outside of Appalachian territory.

The notation on Government Exhibit 6, "Southern Illinois coal in special-type ovens designed for the purpose", means that the plant in question has ovens of a special type designed to use southern Illinois coal or coals of that type. That statement was made to me by fuel technologists. I am not competent to answer from my own knowledge the question whether those special-type ovens (108) are necessary for the use of southern Illinois coal.

As stated at the top of the exhibit, the total figures for bituminous coal include coal from captive mines. The total amount, or the percentages, of captive and non-captive coal are not shown. The amount of captive coal being used by by-product coke ovens is not known.

In 1926 the Bureau of Mines made a special survey of the production of coal by consumer-owned mines and that survey indicated that there were a number of mines, the [fol. 315] majority of whose tonnage which is used by the consumer-owner, that sell on the commercial market.

Government Exhibit 6 shows the amount and percentage of high volatile coal coming from Appalachian territory; it does not undertake to say that this coal could not come from (109) other high volatile fields.

[fol. 316] (110) Referring to Government Exhibit 7, I do not know whether or not the percentages of Appalachian coal shown thereon would be lower in subsequent years. Broadly speaking I am confident that there would be very little change since 1928.

Referring to Government Exhibit 8, I can state definitely that the use of natural gas increased from 1928 to 1930 and I think it more than possible that it has increased since 1930. The records (111) are not yet available for the year 1931. I cannot state of my own knowledge whether or not the use of water power is increasing in South Carolina and North Carolina.

Figures published by the Bureau of Mines show the destination of all-rail shipments and the tonnage moving to tidewater and to the Great Lakes from each producing district. They do not break down the ultimate destination of the coal going to lake ports with respect to the district of origin. To be specific, they show certain tonnage moving from the Ohio No. 8 field into the lake cargo trade; they show the tonnage moving off the lake docks to various inland destinations, but they do not indicate how much of

Ohio No. 8 coal was moved via the lakes to each consuming State. No records of that kind are available. I assume that is the reason that the exhibits which you have prepared based on data of the Bureau of Mines have analyzed the all-rail distribution and then shown the tidewater and the lake tonnage as lump figures.

(118) The three maps introduced as Government Exhibits 11, 12 and 13 are absolutely and very properly comparable, because they relate to the consumption of the three fuels under precisely similar conditions and for the similar purpose of generating electric power in central stations. They do not deal with the use of natural gas, for example, or its increased use, either for manufacturing or domestic purposes and they do not tell the story with respect to other branches of consumption. (119) I have not undertaken to develop the competitive factor that natural gas [fol. 317] and fuel oil constitute, as against bituminous coal, in manufacturing and domestic use. The Bureau of Mines publication, Natural Gas in 1930, shows (120-121) that the production of natural gas increased from 1,313 billion cubic feet in 1926 to 1,943 billion cubic feet in 1930; that the consumption for domestic and commercial purposes increased from 289 billions in 1926 to 376 billions in 1930. (122) In billions of cubic feet, the total consumption of natural gas in Ohio for all purposes was 126 in 1929 and 125 and a fraction in 1930; in Michigan in 1929 it was 4½ and in 1930 about half of this amount; in Illinois in 1929 it was 3.1 and in 1930 9.6; (123) in Indiana in 1929 it was 2.4 and in 1930 2.5.

Redirect examination.

By Mr. O'Brian:

With reference to the consumption of natural gas in the remaining States included in Government Exhibit 8, North Carolina and South Carolina (124) did not use any natural gas either in 1929 or 1930; Georgia used no natural gas in 1929 and one billion odd cubic feet in 1930; Kentucky used 19.5 billion cubic feet in 1929 and 16 billion cubic feet in 1930; Tennessee used 5.4 billion cubic feet in 1929 and 7.3 billion cubic feet in 1930.

In Indiana and Illinois in 1929, as shown by Government Exhibit 8, the proportion of total energy derived from natural gas was .03% in 1929. There was a large increase proportionately the next year, but in relation to other forms of fuel used in those States, even the year 1930 does not indicate any vast quantity of natural gas. To substitute the 1930 figures, which I have just read, would increase the percentage from .03 to .06.

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(127) JOHN F. BARKLEY, a witness called on behalf of the petitioner, being duly affirmed, testified:

Direct examination.

By Mr. O'Brian:

I am supervising engineer of the Fuel Economy Service [fol. 318] of the United States Bureau of Mines. In that capacity I acted as a technical advisor on the purchase of coal for the various Government departments over the United States. I also act as advisor to the Bureau of the Budget on appropriations for fire plant equipment and as advisor in the choice of what type of equipment and what type of fuel to use for new installations. I keep men in the field testing equipment and changing methods of operation and changing fuels in the hope of getting fuel economy.

I have been in my present position about 8 years (128). Before that I was 7 or 8 years with the Carnegie Steel Company as a special engineer. A special engineer is a name for a group of engineers that study plant operations of various kinds in the hope of improving them. I had charge of the field work for the Edgar Thompson works. Previous to that time I did research work for the Bureau of Mines for about 4 years. I attended the University of Kansas 2 years and Michigan School of Mines 2 years and I taught a year in the New Mexico School of Mines.

(129) The differentiation between high volatile and low volatile coal is based on what we call approximate analysis. This means that if you take a certain amount of coal and heat it without air it will give off a certain amount of smoky gases. Now if it gives off 20%, you will say that it is a high volatile coal. It is a sort of arbitrary scheme, but

it is quite workable. I have suggested that coal giving off up to 19% smoky gases be called low volatile coal, that giving off from 19 to 28% be called medium volatile and coal above that high volatile. In some areas those that sell coal around 23% or 24% volatile call it low volatile.

Low volatile coal, in addition to giving off less smoky gases than high volatile coal, is, in general (130), low in [fol. 319] ash and rather friable. This coal burns a little slower than the higher volatile coals and cakes quite heavily. By caking I mean that when it is burned as a fuel on an over-feed stoker it will coalesce together and form a cake, although quite a few low volatile coals do not do this.

(131) For the purposes of steam generation, when using a high volatile coal, you have to have, in general, a larger furnace volume than when you are burning lower volatile coal, if you are going to prevent smoke. The smaller your combustion chamber the less chance the smoke gases have to burn when they leave the fuel bed. In burning high volatile coal, the purpose is to consume as much of that gas as possible before the smoke leaves the chamber. The ideal condition would be to burn all the combustible gases before they leave the combustion chamber. If high volatile coal is placed in a combustion chamber with a low ceiling, you might say, in a general case they would hit the boiler tubes before they had a chance to burn, and that would create smoke and dirty up the boiler. Gas would pass through the boiler and on and out into the atmosphere in the form of smoke.

(132) With reference to the difference between equipment for low volatile and equipment for high volatile coal, I can answer that much better as an individual proposition that I can in generalities. Low volatile coals are burned, in general, on underfeed stokers and for a given capacity you have a certain furnace setting. If you want to burn a high volatile coal you are apt to need a little more furnace setting, and then, a great many of the high volatile coals are burned in what is called a chain grate which is adapted to that type of coal. Years ago they did not set the boilers as they do now and a great many of these low-set boilers have got to burn low volatile coal, but I would never want to [fol. 320] put in a piece of equipment without head room at the present time. I would want to have plenty of furnace volume even if I was going to burn low volatile fuel.

With reference to the factors considered and the analysis made in determining what is the most efficient coal for a given piece of equipment, you consider the style of the equipment and its operators and you make specifications as to moisture content (133), volatility, ash, heat content, perhaps sulphur, generally the ash fusion—the temperature at which the ash melts. In addition, you have to know something about its coking, which I prefer to call caking. That is a new term we are adopting in the Bureau of Mines to indicate somewhat the way coal acts in the different kinds of equipment, leaving the word "coking" to relate to the making of coke.

Certain kinds of coal are best adapted to a particular piece of equipment, or, I might say, better adapted to it. When once you get your type of equipment, then it is more imperative to suit the coal to that equipment. When you have a choice as (134) to your equipment you suit the equipment to fit the type of fuel that you believe is going to be the most economical. But, having once your equipment and your type of operators, then you have to suit the coal to that particular problem.

Adjusting coal to a particular type of equipment involves engineering experience as to the way the coal acts in the equipment and a good many years of experience is required to know what type of coal to use. There are engineering services that will study equipment and say, "with the various types of coal coming into this locality, we believe that the best results will be obtained, perhaps, with a coal of this general nature." Then you use the best judgment you can as to its analysis and your acquaintance with the coal. I acquaint myself with coal from a given mine. I do not think of coal in terms of seams, or areas, or in any other general [fol. 321] direction, except in a hazy sort of way, but I think of it from a given mine. You learn that as you test these various coals. When you get a group of 5 or 6 coals, you test them and find out which happens to suit the case best, always considering what you have to pay for it.

The practice is becoming more general of seeking the advice of combustion engineers or experts. A few years ago Consolidation Coal Company (135) undertook to form a group of what they called sales engineers to advise their customers in the choice of coal.

The greater the moisture content of coal, the less heat per pound is developed. As the coal burns it evaporates this moisture, turns it into steam, and then the steam goes out the stack. You lose that latent heat. If you are running a pulverized fuel job, high moisture makes it harder to grind and you lower your capacities a little. Other factors being equal, the higher the moisture, the more undesirable the coal. I would avoid it if it was economically feasible to do so.

(136) The temperature at which the ash of the coal melts is generally called ash fusion. In coals all over the country the temperature at which the ash starts to melt varies from 1,800 to 1,900 degrees Fahrenheit to as high as 3,000. When you are operating with coal and the ash melts, unless you have designed equipment so that you want it to melt, this generally gives trouble.

The quantity of ash in the coal is also a factor. The amount of ash is really the amount of refuse which goes with it. We naturally do not want any more of it than we can help, except for equipment like the chain grate which requires a certain amount of it to save the grates in the actual burning. That means that for any sort of coal you can design equipment to burn it, whatever the characteristics. You know what you want, and then you generally are limited somewhat to a particular type of equipment. When you have once designed a type of equip- [fol. 322] ment for a particular type of coal, when you change to another coal it sometimes makes a difference; you have to watch that.

Some of the special uses for bituminous coal, other than for power and heat, are coke making, gas making, cement making, and ceramic or refractories (137). The refractory is something that tends to stand against heat, silica brick and pottery being examples.

As to the variation in different kinds of bituminous coal with reference to the characteristics I have mentioned, most of those that are used will not run over 10% or 12% in moisture; the volatile content will be from 16 or 17% up to about 40 or 45%; ash is liable to vary from 4 or 5% up to a maximum for coals that are used of around 16 or 17%; the ash fusion I have previously given; sulphur will vary from 2/10 of 1% up to 5 or 6%.

(138) Each coal has its own little range, or its combination of characteristics, and that of one mine will be a little bit different from the next mine. Approximate chemical analysis give you a pretty good start. It will at least tell you what coal is hopeless. Then when you get a group that seems to look all right, you have to take into consideration that which is the most economical, and the smaller characteristics, such as coking, peculiar fuel bed action, and the type of coke produced for gas equipment. That is why we always run tests. In my own work we have first the Government analysis and then I will pick out a group of coals that I think have possibilities and out of that group I will likely pick the one that seems to answer best after actual trial. Chemical analysis prevents you from having to try out too many coals (139).

The United States Government last year asked for bids for coal on 14 different items, each one having somewhat different specifications. Sometimes the difference is in size, sometimes in volatility. We had about 460 deliveries [fol. 323] for Government operation, which we have reduced to about 15 groups, varying according to size, content, ash, fusion, etc. (140). Last year three items called for 19% volatile, one 17%, five 24%, one 29%, one 30%, which is to be lowered next year, one 36% used for making bricks, one 42%, but we do not always go that high. The specifications as to ash content ranged from 8% to as high as 14%. B. T. U. content runs on a dry basis from 13,000 to 14,300, although sometimes we get a little better than that. We also specify ash fusion and moisture, and then with the coals that meet all the specifications I make trials.

(141) For some items I have as many as 30 or 40 bids from which to make selections. Most cities now have smoke ordinances. In the District of Columbia the smoke ordinance is playing the whole part in the choice between high and low volatile coal. In the District of Columbia the Government buys annually about 250,000 tons. Up to a year or two ago most of this coal came from the New River field but (142) they put on a freight differential there in favor of the Pennsylvania fields, and then when the coal business got bad, we got bids from the better coals in Pennsylvania

which we did not formerly get, and we are buying (143) 80,000 tons of Pennsylvania coal this year.

The average moisture of coal from eastern Kentucky, southern West Virginia and Tennessee which was delivered to the Government, although I do not know whether that is representative because we do not buy much coal for coking, was about 3%. The average moisture of Ohio coal was a little higher than that. They have some coal there of low moisture, but the average is high.

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(144) MORRIS G. WOODHULL, a witness called on behalf of the petitioner, being first duly sworn, testified:

Direct examination.

By Mr. Hardy:

I live in Columbus, Ohio, and am an officer of the Federal Glass Company, which manufactures glass tumblers and glass tableware. This company has been in that business about 30 years and (145) I have been with it 23 years. Its [fol. 324] annual sales are approximately $3,000,000. The company from which we buy coal has been the Island Creek Coal Company. From 1929 to date our annual purchases of coal have been about 25,000 tons. Since 1929 we have bought exclusively from the Island Creek Coal Company because we are entirely satisfied with their treatment of us, their prompt service and the uniformity of their coal (146). By uniformity I mean that when the man in our factory who uses this coal makes no complaint to the purchasing department it must be satisfactory coal. We have been solicited by many other companies and have made experiments or tests with other coal. Years ago we used coal from the Cambridge district in Ohio. We discontinued it because the lack of uniformity and the service we got led us to seek other fields to see (147) if we could not improve upon it. I think it was in the war period when we were compelled to turn to the West Virginia field and we began buying from the Island Creek Coal Company 8 or 10 years ago.

Within the last 3 or 4 months we made a test run of 10 or 12 cars from the Cambridge district. The result of this

test was that although we could use this coal it was not as efficient as the other coal. (148) The man who has charge of converting coal into gas reported that he could not get as hot gas with this coal and I believe he spoke of the high ash content. He simply said it was unsatisfactory and that was the end of it. The inefficiency of the Ohio coal, even at a lower per ton cost, would have cost us more than the coal we are using. We could use it, but it was not efficient.

(149) We do not use extensively other fuels than coal. We have used natural gas for the same purposes as coal and we have also used gas for some purposes for which we could not use coal. We have not used gas wholly in place of coal because it is more expensive.

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(153) George E. Hendrick, a witness called on behalf of [fol. 325] the petitioner, being first duly sworn, testified:

Direct examination.

By Mr. O'Brian:

I live in Kalamazoo, Mich., and am purchasing agent for the Bryant Paper Company, which manufactures printing paper, both uncoated and coated. (154) Its annual sales volume is about $7,000,000 and its normal annual consumption of coal under full operation is between 80,000 and 100,000 tons. It uses coal for the generation of steam, both for transmission, electrical energy, and drying and cooking of paper.

In recent years it has bought coal from the Elkhorn Coal Corporation, Columbus Coal Mining Company, Boone County Coal Corporation and Lorado Coal Mining Company, defendants in this case. We have also bought coal from other companies. We cannot use Ohio coal although there is a 50¢ freigh differential in its favor as against coal from Appalachian territory. (155) Our equipment is not suitable for this coal.

We have a general laboratory for the study of the combustion of coal and the superintendent of the engineering department supervises our power plant. We maintain a daily record showing the efficiency of the coal both on the grates and in the entire plant. By efficiency in the grates

I mean the furnace efficiency of the coal burned. In addition, our plant prior to purchasing coal makes analyses and studies of coal. As a part of my duties I see every one of these daily records of efficiency and I confer every day with the engineering staff, the men who operate the firing equipment. (156) I purchase coal chiefly on the basis of these efficiency tests or efficiency ratings.

I have one of these reports called "Bryant Paper Company Daily Power Plant Report." One of the items thereon is "Efficiency—Boiler, Furnace, Grate" in terms of percentage and also "Efficiency of Plant" in terms of percentage. The first item on the report is "Kind of Coal [fol. 326] Used." The item of efficiency of boilers and grates covers just the burning of coal, the item of efficiency of plant includes the superheaters and the use of steam going through the turbines. (161) The report in question was offered and received in evidence as Government Exhibit 14.

(157) A year ago we tried to use some Ohio coal. It could not be used because the balance between volatile and fixed carbon was out of line for our equipment. The ash was high. The b. t. u.'s were down. The b. t. u.'s might be down because of high moisture or high ash.

As the result of our experience and tests we are now using exclusively three inch nut and slack of the Elkhorn Coal Corporation. We have recently used coal from other companies in Appalachian territory and have used coal from the Middle West Coal Company, a sales corporation for the Southeast Coal Corporation. This coal showed practically the same analysis as the Appalachian coal which we are using, but it was an inch and a half in size, which carried a little bit more (158) of the dust and was worth ten cents a ton less to us in our equipment.

In buying coal we have a very good idea which coals we can use in our plant. We know the specifications on those coals will meet our demands. I know of no scientific formula that can be definitely set down.

(159) We have experimented with coals containing different quantities of sulphur and have found that so far as our plant equipment is concerned, the maximum sulphur content that we can use is .9%. We have a freight rate from Appalachian territory of $3.16 a ton and the ash content is therefore an important factor because we are not inter-

ested in paying a freight rate on ash. The ash content also makes a difference in the operation of the furnaces. We cannot get coal with high ash content off our grates fast enough to generate the steam that we demand. We have four 800 horse-power boilers operating around 192 [fol. 327] to 210% average rating. (160) To burn coal with a high ash content our boilers would necessarily have to be considerably longer than they are because we have only three boilers in service, one being usually down for emergency purposes, and by the time the coal comes off the grate, if there is too much ash, we cannot carry the load.

There are 14 other paper companies in the Kalamazoo valley and I know as a fact that none of them use low volatile coal (161).

In plants that have been built within the last 10 or 12 years it seems to be the custom now to keep a daily record of efficiency similar to that introduced as Government Exhibit 14.

As far as I know none of the paper plants in the Kalamazoo valley use any Ohio coal. Our company is the largest one in the valley.

(162) We sometimes have special tests of coal made in our research laboratory and the results tabulated. I have a report of one of these tests made in accordance with the customary practice of the company on special tests. This report was offered and received in evidence as Government Exhibit 15. It relates to a special test of Ohio coal. As the result of that test we determined that we were not interested in this coal.

(163) Cross-examination.

By Mr. Donovan:

I have been with the Bryant Paper Company 12 years, 6 years as purchasing agent, 6 years as assistant purchasing agent. Before that I was learning the commission business, buying and selling cattle in the Chicago stockyards. I was in the Army during the war and before that was in school. I had no experience in the coal business before going with the Bryant Paper Company. I have studied coal only in connection with our superintendent of the engineering department, concerning (164) our plant use of coal and our needs.

When I purchase coal I act upon the information given me by the superintendent of the engineering department. [fol. 328] If he advised that a particular kind of coal is not working satisfactorily the chances are I would not buy it. I might buy such coal if there were some reciprocal business arrangement which meant a considerable business for us and a small percentage of coal we could mix with other coal. (165 & 166) I would not buy any coal on a reciprocity or any other basis that would cause us any difficulty or reduce our ratings. We might by coal which the superintendent felt was not as efficient as other coal, if on the basis of the price paid for it the ultimate cost, not the initial cost, was favorable.

When I went with the company 12 years ago it did not have the equipment it is now using. (167) I believe it was then using eastern Kentucky and West Virginia coal. During the last 12 years Ohio coal has never been used in any great amount because it was not suitable. During the first 6 years I was with the company Ohio coal was used at one time, but it was not again used during this period. (168) The next use made of Ohio coal was last year following a telegram from an eastern sales organization that they could save us $20,000 with the use of Ohio coal. We then bought 5 cars for test purposes but it did not prove up in the matter of efficiency. Twelve years ago the company had 31 old type boilers, Wickes boilers, with Murphy and Detroit stokers. They were old boilers and stokers. We put in new equipment in 1922 deliberately designed to fit coal from Appalachian territory. (169) During the first 6 years I was with the company it used coal from Appalachian territory except on the rare occasion when Ohio coal was used.

We usually buy our coal from two local selling agents. (170) We have purchased through them coal from the defendants Lorado Coal Mining Co., Boone County Coal Corp., Amherst Fuel Co. and the Elkhorn Coal Corp. During the fuel years 1930-1931 and 1931-1932 we have been using the coal of the Elkhorn Coal Corporation. Before that time we had been using coal bought from the Middle West Coal Company a selling organization representing the Southeast Coal Company, with Elkhorn mines located in eastern Kentucky.

[fol. 329] (171) After making tests of the Elkhorn Coal Corporation's coal and after running it over a period of 6 or 8 months, we felt that the 3-inch coal that they were furnishing was worth 10¢ a ton more to us than the inch and a half coal we were getting through the Middle West Coal Company. We felt that even though this coal came from the same territory as the Elkhorn Coal Corporation's coal, the latter was more efficient and economical for our use.

We have bought Pennsylvania coal from the Butler Coal Corporation or Butler Coal Company. That coal was not bought for use in our central plant. We have two plants, one we use as a booster, and when we are operating at capacity we use the booster plant to carry the load. Pennsylvania coal was bought about a year and a half ago. It was suitable for our booster plant, but we tried it in our central plant and it was not suitable for use in that plant (172) The booster plant is now closed. The delivered price of that Pennsylvania coal was the same as the coal coming from Appalachian territory.

During the last 6 years we have bought coal in Appalachian territory from the Hazard field, from Christopher, from Hilton, from Leonard, from Alley, from the Seco mine, from the Leven mine, from Garrett, from Wayland and from the McGregor mines. About 8 or 10 years ago we bought some coal from the Consolidation Coal Corporation, I believe from their Fairmont mine. Their coal was not quite suitable for our use. (173) It was good Elkhorn coal but we could not see the price they were asking for it. (174) The Consolidation Company has mines in the very region in which the Elkhorn Coal Corporation has mines and we could require coal from those mines rather than from their Fairmont mines. We never tried that because when we found we were satisfied with what we did have, we stayed with that, the price being fair.

Coal from mines located in the same region as those of the Elkhorn Coal Corporation is not the same kind of coal. We cannot use in our equipment Hazard coal from the Hilton, Leonard or Alley mines, but we can from the Green [fol. 330] Ridge and Christopher mines (175) because they pay a little bit more attention to the way they prepare their coal. A very important factor in the coal we get is the way it is cleaned and prepared. I do not know whether or not coal from Appalachian territory is, in general, cleaner

coal and better prepared than that which comes from Ohio. I have never used enough Ohio coal to know.

The mines in Ohio were in existence long before those in Appalachian territory and (176) Ohio was sending coal into Kalamazoo long before Appalachian territory. Our company started in 1895.

Coal suitable for us has to have a balance between volatile and fixed carbon—a minimum of 33% on the volatile and not to exceed 58 or 59% on the fixed carbon. If we keep within those balances the chances are 99 out of 100 that we will have good operations.

When a selling agent comes to me (177) and says that he has coal that will burn in my equipment I ask to see his analysis and if I find it is out of balance I do not discuss the matter further. Since we turned down Ohio coal a year ago the Ohio people have given up coming to see me. A salesman for Pennsylvania coal came to me only that one time a year and a half ago. (178) Some salesmen get so discouraged that they never come back and some come back every year.

The volatile of the Ohio coal does not stay within a balance for our use and their ash is generally too high for our use. On a dry basis we have an ideal coal with 38.60% for volatile, 56.94% for fixed carbon, 4.46% for ash and 14,700 b. t. u. These percentages are those on a test of 29 cars of the Elkhorn Coal Corporation's coal from Garrett, Ky. On a test of 4 cars of Ohio coal the volatile was 34.41%, (179) fixed carbon 54.88%, ash 10.71% and b. t. u. 13,641. As I remember it, that Ohio coal was cleaned. If our volatile gets down below 34 points or the fixed carbon gets too high, from past experience in our plant our efficiency immediately drops. I cannot answer whether that Ohio coal [fol. 331] was washed. I believe that might have made a difference. (181) I cannot explain to the Court in a technical way what fixed means. I have been following what has been done previously by the superintendent and the experiences in the plant.

I find that there is a difference in coals from different mines in Appalachian territory. (182) I assume that the same differences would exist in Ohio. I have tested the coal of only two Ohio producers. Very few salesmen for Ohio producers come to me, maybe three or four a year. I have not noticed any Ohio coal that would be suitable for

our use. There are records on all mines and I have not found any that would be suitable. (183) I have read the analysis of a hundred different Ohio mines, but have actually tested coal from only two.

I have a book known as the Keystone Coal Buyers' Catalogue and Mine Directory for 1931. (184) In the case of the Ohio field I have examined the analysis of coal in this book in order to determine whether or not I would consider purchasing the coal. In the case of the first 10 or 15 Ohio companies listed there, the volatile of all of them is 34% or more but the ash is tremendously high. (185) Their ash varies from between 6 and 13%. That analysis is of coal at the seam, which is not cleaned. If cleaned, the ash content might be much less. The characteristic of the coal might be such that they could not get it out, but washing should clean it. An ash content of 6 or 7% would be suitable for our purposes and certain of the first 10 or 15 companies listed have at least 6 or 7% ash content, but with most of these the volatile is way beyond what we demand. (186) If it goes over 38% it would not be suitable for us because the generation of steam and the drying of our paper is a big factor in our cost. We might be able to burn it but it might run our costs so far out of line—it comes to a question of ultimate cost. If it did not increase our costs, we could use it. I don't think that more than 3 or 4 Ohio salesmen called on me, perhaps 6 at the most. (187) We have not had any salesmen representing the Pittsburgh or Fairmont district since buying from the Consolidation Coal Co.

We had industrial engineers for building our plant. We [fol. 332] have B. & W. vertical tube boilers with Frederick stokers. Our usual load averages between 190 and 210% of boiler rating. (188) We use semi-coking coal for steam purposes. (189) The fusion temperature of the ash in the coal we use is around 2,650, according to my best recollection. I believe the Frederick stoker is still being made. I believe the Combustion Engineering Corporation is now in receivership. I am not sure about the stoker itself. This stoker represented modern equipment when it was installed in 1922. Within the last 10 years there has been, I think, more advancement in stokers than in the previous one hundred years. I would call this modern equipment for the paper industry. It seems that it is not able to buy modern

equipment. (190) When this equipment was built in 1922 it was selected as the result of the experience of our plant with the various coals it had used previously.

Consolidation Coal Company has more Elkhorn coal than any other producer in that field.

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(191) M. G. GEIGER, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. O'Brian:

I am manager of Westvaco Chlorine Products, Incorporated, of South Charleston, West Virginia. We are industrial chemical manufacturers. Our chief products are chlorine and caustic soda, and allied with the chlorine products are carbon bisulphide, carbon chloride, chloroform, and the various sulphur chlorides. We are perhaps the largest producing company in the country today of caustic soda and the basic chlorine. (192) Our annual coal consumption under normal operation is about 150,000 tons, and at the present rate of operation about 90,000 tons a year. The building of our plant was started in 1914. At that time the steam end of the plant was natural gas. We discarded the use of natural gas about 1923 on a price basis. We have probably purchased coal from all the defendant producers with mines [fol. 333] in the Kanawha district. We have purchased from the Dickinson Fuel Company, representing the defendant Leevale Collieries, Inc., and the defendant Dry Branch Coal Company. We purchased from the Wyatt Coal Sales Corporation, (193) representing the Wyatt Coal Company, also a defendant. We have also bought coal from the defendants Carbon Fuel Company, Kelly's Creek Collieries Company and the Youghiogheny & Ohio Coal Company. Substantially all the coal we buy is from the Kanawha district.

When we installed our present steam equipment we specified equipment that would burn Kanawha coal because we are located right in the heart of the region, that is, we asked that the equipment be designed and built to fit the peculiari-

ties of this particular coal. To the best of my knowledge the equipment was built for that special purpose.

For the past two years we have bought coal on contract from the Dickinson Fuel Company and the Wyatt Coal Company. (194) At contract periods there are probably 6 or 8 large defendant companies located in the Kanawha district that solicit our business.

Cross-examination.

By Mr. Donovan:

I personally know that we have been doing business with the Dickinson Company for 4 or 5 years, but we have probably done business with them from the start. The Kanawha district as I refer to it probably does not include the whole district. It includes mines on both sides of the river but we are particularly interested in the Cabin Creek section. The Kanawha district covers (195) quite a large territory which could serve us. As to how many producers in that district there are from whom we could purchase coal, we can burn coal at a price, but we are now specifying Dorothy coal and we can burn coal from any producer making Dorothy coal. There are several (196) producers that can furnish this coal. [fol. 334] Prior to 1923 when our gas burning equipment was converted into coal burning equipment we had not been buying coal in any quantity. Our high pressure equipment was first installed in 1929 and finished in 1931. The average price which we then paid for coal was between $1.80 and $1.90 a ton delivered. We are now paying $1.48½ per ton of coal delivered. The price at the mine is 60¢ a ton. (197) The freight rate is 88¢ a ton, which we do not consider fair. We are contemplating registering a complaint with the State of West Virginia, the traffic being intrastate.

(198) The Campbells Creek Coal Company is not a defendant here. (199) It has two mines on Campbells Creek Branch and has a large production probably running over 1,000,000 tons. We could get coal from them but they do not have the kind of coal that we want. We can use their coal but we prefer not to use it from our steam plant standpoint. It is higher in ash as a general rule and lower in fusing point although they have one kind of coal up there that has a fair ash fusion point. (200) At the same price their coal is not worth as much to us. That is the only dif-

ference apart from the question of price, they could give us some service in the kind of coal we need if we had to fall back on them. That particular mine undoubtedly could take care of our requirements if we got all of the coal. We are not the largest manufacturing concern in that region. From the standpoint of coal consumption the Carbide and Carbon Corporation, located there, is about our size. The Duponts are much larger and the power company is much larger. We rank about third.

I think that the annual production of the Campbells Creek mine of the Raymond City Coal Company is over 200,000 tons and that mine is not a defendant. (201) All these mines are around what we term the north side of the river, and they are all the same. That is also true of the Raymond City Coal Co. and the Pittsburgh Steam and the Campbellton Coal Company and the Dundon mine of the Coal and Lumber Company. (202) I am not familiar with the Essex Coal Company or the Endslow properties.

[fol. 335] There is plenty of coal in this district that is not being mined and could easily be opened up if there was a demand for it.

(203) Redirect examination.

By Mr. O'Brian:

Coal is one of the largest items in our cost of production (204) because it is really termed by us a raw material. We use an electrolytic process demanding large amounts of power. The cost of coal is approximately 50% of our cost production.

I have previously stated that in contract periods 6 or 8 of these defendants solicit our business. The difference in the prices they quoted at the last contract period varied from nothing to 20¢.

(205) When I said that price was the determining element in the purchase of coal I did not mean the actual purchase price, but the price as interpreted in terms of efficiency at our plant, or usefulness.

The ability to secure a large and steady supply of the same variety of coal is one of the elements we take into consideration in contracting for coal.

Our last installation of high pressure equipment cost approximately $500,000. That was in addition to our previous equipment and was equipment as to which we specified the coal that it was to burn before it was designed.

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(206) Reuben B. Robertson, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. O'Brian:

I am president and general manager of the Champion Fiber Company at Canton, North Carolina. The company manufactures pulp, paper, caustic soda and tannic acid. Its normal annual consumption of coal is about 200,000 tons.

Our coal is today burned on 2 boilers, each having a capacity of 10,000 horse-power. They are designed for the use (207) of powdered coal and operate at 450 pounds pressure. The equipment cost about $1,500,000 to install and [fol. 336] was designed to use the coal from Appalachian territory. We do not burn any low volatile coal and I do not think we can burn such coal on any basis of efficiency or economy. The boilers are designed for a certain relation between the air volume and the analysis of the coal. All the coals that we have tried out in the operation of the plant have been from Appalachian territory.

We have bought coal from the following defendants: Blackwood Coal & Coke Company, Southern Coal & Coke Company, Mahan-Ellison Coal Corporation, Gatliff Coal Company, Hignite Coal Company, Harlan, Mahan Jellico Coal Company, Pruden Coal & Coke Company, Cambria Coal Company, Benedict Coal Corporation, Clinchfield Coal Corporation, Virginia Iron, Coal & Coke Company, and some others as well. (208) The principal sources of our coal are the large operators, Holmes-Darst Coal Company, Southern Coal & Coke Company, Blackwood Coal & Coke Company, Blue Diamond Coal Company and Virginia Iron, Coal & Coke Company. The necessity for having a steady and large supply of coal of the same variety is a factor with us in contracting for coal. That is one reason we buy

from some of the larger operators; we are assured of greater uniformity of quality and volume.

In trying these so-called Appalachian coals we have found that we could not use efficiently some coals, particularly those that have a low ash fusing point. My recollection is that our standard ash fusing point would be about 2,200 degrees. A lower fusion temperature of ash produces a slag in the furnaces that ultimately (209) blocks their operation; the ash melts and chokes the furnace itself, or the ash bed.

[fol. 337] GEORGE B. SHEPPARD, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. O'Brian:

I am the manager and comptroller of the Anderson Gas & Utility Company at Anderson, South Carolina (210). I have been holding this position since the middle of last November. I am an engineer and have been in the gas business for 13 years, spending 7 years in Houston, Texas, 3 years in Providence, Rhode Island, and one year in New York. In that capacity I have had occasion to make studies and to make tests of the use of coal, particularly with reference to gas making purposes.

The company with which I am now connected manufactures water gas for distribution and sale. It is a subsidiary of the Eastern States Gas & Power Company operating three plants in our section. The normal consumption of coal for the Anderson plant is about 1,200 tons a year (211). The Eastern States Gas and Power Company buys coal from the defendants Creech Coal Company, Clinchfield Fuel Company, and the Virginia Iron, Coal & Coke Company. We do not buy any coal except in the so-called Appalachian territory.

Since I went with this company I have spent about 6 months in testing out the usefulness for our purposes of different kinds of coal and as a result of that we are using coal from the companies which I have mentioned. We are buying this coal on contract.

With reference to the usefulness of different kinds of bituminous coal for the manufacture of water gas, I have found that each coal differs from the other in the matter of efficiency for a particular equipment (212). The last coal which I have tried out and discarded was from the Clinchfield Fuel Company. The ash content was higher [fol. 338] than that of other coals we tried and we found that we had to clean the fire every day and that we did not get the same efficiency, that is, it took more coal per thousand cubic feet of gas than other coal we could use.

Before buying coal we study the analysis furnished by the seller and following that we pick out several and experiment with them to find the best. In the manufacture of gas in our plants one of the principal factors is the sulphur content. Our maximum is .6%. Our next requirement is ash content of 3% or lower. (213) The temperature of ash fusion plays some part but if you get low ash coal the amount of ash is not enough to bother us. If you get the proper ash content, sulphur content, and volatile, the fixed carbon takes care of itself. We select coal on the basis of volatile, sulphur and ash.

For high volatile coals you need a larger fire box for the reason that the flame is longer. In burning low volatile coal you do not have the long flame and you can have a smaller fire box. With reference to the long flame in high volatile coal, the gas must be burned before it reaches the boiler-tubes; if it is not burned before then it just goes off as smoke. (214) In high volatile coal the purpose of the combustion chamber is to get all the heat possible out of the gas as well as out of the coal bed itself. If you have a low ceiling combustion chamber, the gas is cooled and not consumed. (215) With low volatile coal you do not need such a large fire box, and if you do not need it you certainly do not want to build it because the larger the fire box—the larger the set-in—the more chance there is of excess air mixing in with the flue gas, cutting down your carbon dioxide content in flue gas, and therefore if you can de- [fol. 339] crease the size of the fire box for low volatile coal you are that much better off in your efficiency.

If you use low volatile coal, which does not give as much gas as high volatile coal, in a high volatile chamber, your fire bed is farther away from the boilers, the tubes. You

do not get the same effect from the radiated heat when you take the boiler itself away from the fire. (216) While both low volatile and high volatile coal will actually burn in either of these types of combustion chambers, they will not burn with the same efficiency unless they are burned in the type of chamber designed for that kind of coal. I have previously had experience with the construction of boiler equipment. In certain types of steam plants it is absolutely necessary for the boiler manufacturer to know the analysis of coal before he designs the boiler. That is coming to be more generally a practice under modern development and increasing knowledge of coals and of the principles of radiation.

In making contracts we are solicited by more than one of the representatives of Appalachian territory. They compete for our business. (217) No coal agents except those from Appalachian territory solicit us.

The cost of coal is about one-third of our total cost of production. In our plants production takes place during a comparatively few hours of the day and our objective is to produce 1,000 cubic feet of gas with 40 pounds of coal, which is high for a large plant and low for us. Our average experience has been about 45 pounds per thousand cubic feet. The cost of 1,000 cubic feet would be reduced about one cent if we could reduce the amount of coal used for generating this amount of gas about 3 pounds. (218) The coal required to produce 1,000 cubic feet costs us about 15¢, [fol. 340] and if we could save 2 pounds of coal per thousand cubic feet, the saving would approach one cent.

Cross-examination.

By Mr. Donovan:

I graduated from Princeton in 1917 and then spent two years in the Army, being everything from a private in a machine gun battalion to first lieutenant in the infantry. After that I worked as a helper in the fabricating shop of the McClintock-Marshall Construction Company at Pottstown, Pa. (219) The shop was fabricating structural steel for a coke oven. After 6 months there I was 9 months with the Raineywood Coke Company at Swedeland, Pa. I was a helper in the benzol plant, ran the light oil stills, sepa-

rated the benzol, toluol, loading up tank cars. I was helping the operator who had charge of collecting the light oil, redistilling it and separating it into the three component parts and storing it, shipping it. (220) After that I worked as a machinist's helper on the construction of the coke oven plant of the Donner Steel Company at Buffalo, N. Y. I helped the machinist erect the conveyor belts. I was there three months and in 1920 went to the Providence Gas Company at Providence, R. I. I was working on the heater, which takes care of the manufacture of coke. (221) Coal is the only raw material used in making coke and I had to see that the coal was properly coked before it was pushed out of the oven. I had to examine the temperature of the walls of each coke oven at least every two hours. I tended the furnace of the oven where the coal was burned to make coke. I was with this company for three years, but not on that particular job. I worked in a water gas plant for three months and I was a cadet engineer for the rest of the time. A cadet engineer is a young engineer who is being trained to be a gas engineer.

In 1923 I went to Houston, Texas, where I was assistant superintendent of the plant of the (222) Houston Gas & Fuel Company. I practically ran the plant, saw that the [fol. 341] gas was made every day and measured. The plant had a capacity of 10,000,000 feet a day. It did not burn coal, but petroleum coke and coke-oven coke. I was there 7 years and in 1930 went to New York City as an engineer for the Eastern States Gas Company of New York. This company owned the Gas Engineering Company of Trenton and the Eastern States Gas & Power Company (223) and was considering going into the butane gas business on a large scale. We used coal in the plant of the Gas Engineering Company of Trenton and we designed plants for the manufacture of different kinds of gas. This company also had engineers, but I had a part in designing the plant as the engineer for the Eastern States Gas Company. My part was to interview manufacturers of boiler equipment, get bids and get contracts for the building, and also to help design the plant. I did the ordinary things an engineer does in designing a plant. I figured out the size of the heat exchangers, boiler equipment, etc. On this construction I aided the engineers of the Gas Engineering

Company, a subsidiary of the Eastern States Gas Company. (224) In November, 1931, I went to Anderson, South Carolina. I am comptroller of the Eastern States Gas & Power Company, comptroller of each of the subsidiaries and manager of the Anderson Gas & Utility Company, which serves the city of Anderson with a population of 25,000. We average about 90,000 cubic feet of gas per day, and use about 1,200 tons of coal a year. (225) In South Carolina we have a similar plant at Sumter and another at Greenwood. The Sumter plant takes about the same amount of coal as the Anderson plant, the Greenwood plant, which is just getting started, about one-fifth as much.

When I was in Providence the company used a mixture of high and low volatile coals. I do not know the analysis [fol. 342] of those coals. I never bought any coal until I went to Anderson about a year ago. The Anderson plant was built when I went there.

I do not know that there is any modern equipment for boilers that can burn efficiently both high volatile and low volatile coal.

(226) Redirect examination.

By Mr. O'Brian:

During the last six months I think that six different coal companies, all from Appalachian territory, have solicited us. Most of them represented the defendants. I think that freight rates limit us to the use of coal from Appalachian territory. There is no natural gas in South Carolina.

JOHN BEHNKE, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. O'Brian:

(228) I am secretary of the Detroit Sulphide Pulp & Paper Company, stationed at Detroit Michigan. I have been with the company about 27 years. It manufactures high grade wrapping paper and its annual sales approximate $2,000,000 and its normal annual purchases of coal

about 50,000 tons. We buy coal from the Island Creek Coal Company (229) and the Carbon Coal Company and I believe we have brought from the Dexter Coal Company.

Our company maintains a laboratory for testing the various raw materials and coals that we use. We have two graduates of the University of Michigan and three or four assistants. They make tests of coal from time to time. I do not know how far these tests enter into the determination of the coal we will buy; our purchasing department dictates that. I have nothing to do with the purchasing of coal except in a supervisory way (230) and in this way I am made acquainted with what coals are bought from time to [fol. 343] time. When there is any trouble the engineers probably come to me about it or to the president of the company.

At the present time we are buying only coal from Appalachian territory because other coals are not satisfactory for our equipment. When we have tried other coals our engineers complain about their getting into a jam and that they are unable to keep up the steam and the power in the plant. We have tried Ohio coal and as the result of such trial have discontinued it as unsatisfactory. We also tried, a long time ago, Illinois coal. (231) It was not good at all, as I understood it, and we discontinued using it. In fact we bought only a few cars.

The cost of coal represents from 10 to 12% of our cost of production.

Our present coal burning equipment was installed 14 or 15 years ago. We have 10 Taylor stokers and we use Taylor boilers. I do not know the horse-power of the stokers.

Cross-examination.

By Mr. Donovan:

My duties are the usual duties of a secretary (232) and do not include the purchase of coal or only in a supervisory way as an executive of the company. We have a purchasing agent.

I do not know the type of our boilers or the combustion chamber temperature or what percentage boiler rating is usually allowed or the analysis of the coal which we require. The engineer who is running our boiler plant comes to me (233) and tells me a certain coal is not satisfactory and I

listen to his complaints, but I know nothing about it of my own knowledge.

(234) We have been using coal from Appalachian territory for 15 years. We have tried coal from Pennsylvania or from Fairmont, I think about 8 or 10 years ago. We may have used or tested some since but I do not know this. We have tried Ohio coal within the last 3 or 4 years. I [fol. 344] think that prior to that time we had used a few cars of Ohio coal for test purposes.

The factors determining what kind of coal we purchase are decided by our engineering department. As I understand it, we have to have a coal that is efficient, for the reason that we would require a much larger capacity or a change in capacity to use other coals. (235) We have a limited capacity in our fire department and if we attempt to use coal which does not produce as much power as the finer grades of coal from Appalachian territory, we could not operate. I do not know of my own knowledge, only from what the engineers tell us, whether or not other coals are less efficient in producing the necessary power than coal from Appalachian territory. The ultimate cost to our plant in turning out our product enters into this question of efficiency. It is an important factor. If the cost of a particular grade of coal is low enough it may be a determining factor providing we can produce the power required. (236) I do not know whether, if a given coal is one that we can use and is cheaper than a coal we prefer, we would take the cheaper coal.

Charles Freeman Carter, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. O'Brian:

I am the engineer of the Nashville Gas & Heating Company of Nashville, Tennessee. The company manufactures gas for sale to the public. (237) I have been with the company since 1920. Its normal annual consumption of coal is about 50,000 tons; it will run anywhere from 35,000 to 50,000 tons.

In the last few years we have been getting our coal chiefly from Harlan, Ky., in Appalachian territory. In that [fol. 345] period we have bought coal from some of the defendants, from the Blue Diamond Coal Company, and the Southern Coal & Coke Company, and also from the Holmes-Darst Coal Company, Campbell Coal Company and a number of others in the Harlan group. Normally 5 or 6 companies solicit us, in competition with each other, to purchase their coal. There generally is a variation in price in their proposals.

(238) We have a combination plant producing both water gas and coal gas. In the coal gas plant we make coal gas by the destructive distillation of bituminous coal. That process is very peculiar. It seems that all of the different characteristics of coal come out and manifest themselves, and if we do not have just the right kind of coal suitable for that purpose, our efficiency drops off very materially. For that reason it is very essential that we have a coal that will properly carbonize to give a good gas yield, a good tar yield, and a good coke yield. In reaching that objective I use the approximate analysis of different coals as an index but I cannot go entirely by the chemical analysis. There are certain characteristics in coal which chemical analysis do not seem to indicate with respect to their value for coal-gas production. Therefore as a rule I take the coal analysis as an index and then try out a particular coal in that particular plant.

I have tried out and experimented with Tennessee coal because that is near at home, practically 100 miles from us. The freight rate is low and it behooves us to locate a coal in that section, if it is possible, which will be satisfactory. Under those conditions I have tried out several Tennessee coals, and I have not found that they were not satisfactory for my purpose. (239) I might say in all fairness that Tennessee coals, for some purposes, and where the equipment is designed to burn them, are very good coals. As a [fol. 346] matter of fact one of the coals which I got in did not satisfactorily make gas, although I burned it very satisfactorily in my boilers. The approximate analysis of some of those Tennessee coals was practically the analysis which we find in the coals in Appalachian territory. You will find the moisture, fixed carbon, volatile, ash in that coal—

and in some of them the ash is very high, of course—but the analysis of others will run along and you would think they could be used for gas-making purposes. Some of the analyses are so pretty that I am always tempted to try them, which I do, but it is inherent in the coal. The structure is such that it does not give off a good yield of gas and at the same time give us a good coke yield. We have a coke market which we have to maintain. We want to keep our coke at the highest possible degree of efficiency for sales for domestic use. (240) That is an increasing use of coal. The sulphur content is very important. In our case we try to keep the sulphur content down to at least one-half of one per cent.

I have tried Alabama coal. That was a very good coal. This particular coal did not store as well and I got it at a time when it was impossible to get coal from Appalachian territory due to car shortages, etc., and I got this coal and tried it out. I would not say that it was not satisfactory, but from an economic standpoint we could not afford to use that coal 100%; so immediately upon the conclusion of the car shortage we went right back to the Appalachian coal.

We are 100% dependent upon having an adequate and steady supply of coal of uniform, inherent qualities. If we get in a bad coal, we throw all of our gas-making equipment out of balance and it takes some time and some money to bring it back. I have often told coal men that on certain coals I would rather pay them the price of the coal and [fol. 347] not have the coal, rather than to have the coal in my plant and have it throw the whole balance out. (241) By throwing our equipment out of balance, I mean that it damages it or produces maladjustments. In this particular type of equipment, which has horizontal retorts, stop-end, it causes a tar accumulation or it causes burning the coke in the furnace, stopping up the flues, which causes the heat to drop down, which causes the efficiency to drop off very, very materially, and the gas production goes down.

In our coal gas plant the cost of coal exceeds 50% of our total cost of production, possibly 52 or 53%. In the water gas plant it would possibly be 15%.

All bituminous coal is not equally suitable for the manufacture of coke.

Cross-examination.

By Mr. Donovan:

The Mary Helen Coal Corporation (242) and the Black Star Coal Company, which are not defendants, are in the Harlan field from which we get our coal chiefly. The coal shipped from Myrna, Ky., is a very good coal. With respect to coal of the Black Star Company I tested out not very long ago some 5 cars and I am now using coal from the Southern Coal & Coke Company and also from the Campbell Company.

The coke which we manufacture and sell comes in competition with coal. In our water gas process we use coke which we manufacture, as well as coal.

(343) In 1923 I used about 170 cars of Alabama coal. I have not tried any Alabama coal since then.

By Judge Soper:

Q. I did not understand what you said about coal from the Mary Helen Company.

[fol. 348] A. I am not familiar with the connections or some of the connections of a number of companies up there. Some companies control the output of different mines, from different shipping points. When I buy coal, I buy it from one particular shipping point. I know that coal and I want that coal. The Mary Helen Company was shipping it at one time. In the case of this Myrna coal I spoke of, there is a mine right close to the Myrna coal which they cannot ship me, although it is not very far from it, but it is an altogether different coal and I cannot use it. When I get it, I know it right away because my plant goes down. With respect to the connection between the Mary Helen coal and the shipping points, if I knew the shipping points, I believe I would be able to answer the question satisfactorily.

(244) Redirect examination.

By Mr. O'Brian:

I have perfect confidence in the men I have been buying coal from. When I tell them I want coal from a certain point, they always ship it from that point and I do not feel the necessity of verifying that.

The freight rate per ton of coal to Nashville from the Alabama fields is about $2.00, from the Tennessee field about $1.15 and from Appalachian territory $2.20.

WILLIAM B. HITCHCOCK, a witness called on behalf of the petitioner, tesified:

Direct examination.

By Mr. O'Brian:

I am vice-president and general manager of the Portsmouth Refractories Corporation at Portsmouth, Ohio (245). I have been connected with the company 22 years. It has two plants at Portsmouth, one manufacturing silicate brick and the other fire brick (246). Its annual [fol. 349] volume of business is about $500,000 to $750,000. During the last 2 or 3 years its annual consumption of coal has varied from 10,000 tons to 25,000 tons.

In the last few years we have been burning coal from certain of the defendants. We have a contract at the present time with the Dickinson Fuel Company for coal from the Winifrede seam in the West Virginia field. We also use coal of the Crystal Block Company sold by the Cleveland-Cliffs Iron Company as agent. In the last 2 years we have bought only from these companies (247). We have confined ourselves of late to coal from the Winifrede seam near Welch or Williamson, West Virginia. We have selected that coal on the basis of our experience with coals, as well as on the basis of price. Coal from the Winifrede seam has given us a better cost, better efficiency, on account of the ash and sulphur content.

Ordinarily 8 to 10 coal companies solicit our business. We need coal with a very high ash fusion and low sulphur content. The low sulphur content is peculiarly distinctive in the burning of our product. My experience is that all bituminous coals are not equally useful for our business (248).

I have used Ohio coal in recent years and have found it too high in sulphur and too high in ash. We have a mine of our own in southern Ohio but we nevertheless prefer to buy coal from Appalachian territory. We have been

buying the latter coal for the last 6 or 7 years. We have found that coal from the Winifrede seam in Appalachian territory best meets our requirements as to efficiency.

The cost of coal represents 18 to 20% of our total cost of manufacture.

The Ohio freight rate on coal is about 50¢ a ton lower than the freight rate from West Virginia (249).

[fol. 350] Cross-examination.

By Mr. Donovan:

The cost of production of our Ohio mine averaged around $1.75 a ton. The company has owned this mine ever since its organization. It is right next to the clay property where we mine clay for the manufacture of brick. Coal from this mine was used for 15 or 20 years. The use of coal from this mine was discontinued during the war or right after it. We have been in the refractory business since 1900 (250). Our coal mine has been shut down since we started using West Virginia coal 8 or 10 years ago.

Cost is one of the principal factors in determining the coal we will use. Cost is based on the brick burning costs, so much per thousand, and its equivalent, and our reports on that are the basis upon which we work. We select the coal that costs us the least (251). For 15 or 20 years we used coal other than from the Winifrede seam, (252) but that has proved the best in our experience.

The freight rate per ton from our Ohio mine is 75¢ and from Appalachian territory $1.23 and from the Athens and Kingsville districts in Ohio $1.05. Coal from Appalachian territory is much cheaper than Ohio coal.

Frank Swihart, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. Hardy:

I am superintendent of the Dalton Foundries, at Warsaw, Indiana (253). The company makes grey iron cast-

ings and malleable iron castings and some finished articles. I am superintendent of the finishing department. I have supervision of the maintenance of all machinery and equipment.

[fol. 351] The company in normal times uses annually about 4,000 tons of bituminous coal. The coal is used for melting malleable iron in the malleable furnace and for annealing iron in the annealing ovens after the castings have been made. Our annealing process is about the same process used in all foundries. The iron is heated up to a certain temperature in a packed oven and dropped down to a certain temperature to make the iron soft and pliable instead of brittle and hard. (254) This requires control of the heat. The companies from whom we have purchased bituminous coal during the last 3 years are the Elkhorn Coal Company, Cabin Creek Consolidated Coal Company, and the Consolidation Coal Company. The coal we have purchased is produced in eastern Kentucky in Appalachian territory. Prior to 1925 we used some Indiana, Illinois, and Ohio coal. We have discontinued use of that coal. We find coal from the Elkhorn mine to be much more (255) satisfactory and efficient. The Ohio coal was high in ash and formed a considerable amount of clinkers in our fire box and we could not regulate the flame in the melting pit within our melting furnace. We did not get as much heat and we did not get uniformity in heat; we could not place the heat at the particular spot where we wanted it, which is even distribution all over the oven. The Ohio coal had these disadvantages, compared with coal from Appalachian territory. The freight rate on Ohio coal is lower than on coal from Appalachian territory.

(256) Our experiment with Indiana coal showed that it was entirely out of the question for use in the malleable furnace. The fire box would fill up with clinkers before we could complete the melting of the iron. This alone was sufficient to prevent the use of this coal. Compared with coal from Appalachian territory the ash was higher and it did not produce as much heat. Our experiment with Illinois coal showed it to be about the same as the Indiana coal, high ash, a great many clinkers, an uneven heat in the [fol. 352] melting pit, and a much lower temperature than we could get from coal from Appalachian territory. (257) The freight rate on Illinois coal is lower than on the Appa-

lachian coal. It would not be practicable to change our equipment so as to use Indiana, Illinois, or Ohio coal.

We have been solicited by companies in Appalachian territory other than the three I named. I would say that the competition among companies in Appalachian territory is active. We consider coal from that territory as practically indispensible on account of the long flame, the high gassing qualities and the uniformity of heat which it gives for melting iron in the malleable furnace. The cost of coal is approximately 20% of our cost of production.

(258) Cross-examination.

By Mr. Donovan:

I do not know the freight rate on coal from Pennsylvania to our place. As far as I know we have never tried Pennsylvania coal and I do not know whether or not it would be suitable for our use. We have brought from the Consolidation Coal Company, but we cannot get from them exactly the same coal. (259) Its coal differs in clinkers and ash and in the regulation of our flames in the melting pit. We are now using Elkhorn coal. The Consolidation Coal Company has mines in the Elkhorn field and we have bought from those mines. We found a difference in the coal from those mines and coal from the Elkhorn mines from which we are *are* buying now. We have bought some coal from the Cabin Creek Consolidated Coal Company. We have some of its coal in our yards at the present time, but I cannot tell the town from which it comes. We are now making a test run of this coal and using it in our annealing ovens where (260) it is not such a high factor for efficiency. I do not know where the mines of this company are located.

[fol. 353] (261) Cornelius Youmans Reamer, a witness called on behalf of the petitioner, testified:

Direct examination.

By Mr. Hardy:

I am in the ice, coal and wood business at Columbia, South Carolina. I have been in this business ever since

1906. I buy and sell anywhere from 16,000 to 40,000 tons of bituminous coal in a year. My customers are principally household consumers, although I have a few of what we term wholesale users, where they use it in car lots for buildings, and some few industrial plants.

Within the last 3 years I have bought coal from the Blackwood Coal & Coke Company, Virginia Iron, Coal & Coke Company, General Coal Company (262) D. C. Campbell Coal Company, Darby Coal Sales Company, Clinchfield Fuel Company, Steinman Coal Company, Bermar Coal Company, the Grider Coal Sales Agency of Birmingham, Ala., and Randall Brothers, of Atlanta, Ga. I have bought from the last named company coal of the Creech Coal Company and through the General Coal Company I have bought coal of the Stonega Coal & Coke Company. I have also dealt with the Splash Dam Coal Corporation.

With the exception of Montevallo coal, which comes from Alabama, all the coal which I have bought and sold is from Appalachian territory. I have bought such a small quantity of Alabama coal that it is negligible (263). This year I ordered only two cars, not over 150 tons. The reason I have bought coal from Appalachian territory is because of the price and the higher freight rate from Alabama, which makes it almost prohibitive in competition with these other coals. The freight rate on coal from Appalachian territory is the best I can find. I think I get a better price on the Appalachian coal than on other coal—a combination of both the price and the freight rate; and [fol. 354] also the quality of the coal is the determining factor in my purchasing of Appalachian coal. I personally think some Appalachian coal is equal to the Montevallo coal. The only reason I order any of this coal is because a few customers prefer that coal. They have the idea that it is better coal.

(264) I have approximately 1,000 customers, home owners, office buildings and the like, and a few industries.

I have been solicited by the various companies I have named. The price to me appears to be the same on the same grades of coal bearing the same freight rate. There is a differential in freight rates between the fields in Virginia and those in Tennessee, which I think causes the Tennessee

mines to give a little better price in my territory, than possibly they would have otherwise.

Some of the companies I named are sales agents. I consider the Darby Coal Sales Company a sales agent. The Stonega Coal & Coke Company was taken over by the General Coal Company. (265) I do not know whether you would term the latter a sales agent for that coal or not, but the companies I principally buy from are operators.

Offers in Evidence

(266) Counsel for the defendants offered in evidence six stipulations entered into between the petitioner and the defendants. These stipulations were received in evidence as Defendants' Exhibits 1, (267) 2, 3, (268) 4, (269) 5, (270) and 6. (271) There was attached to the stipulation received in evidence as Defendants' Exhibit 6 a two-sided map relating on one side to natural gas trunk pipe lines in the United States and on the other side to oil and gasoline trunk pipe lines, and a blue print relating to electric transmission lines of eastern United States. The two-sided map was marked Defendants' Exhibit 6-A and the blue print was marked Defendants' Exhibit 6-B.

[fol. 355] (269) In the stipulation received in evidence as Defendants' Exhibit 4 the petitioner reserved the right to object to its admissibility upon the ground of relevancy and materiality. The stipulation related to the net income or deficit and Federal income taxes of the coal mining industry shown in unaudited Federal income tax returns. Counsel for the United States objected to the admission of this stipulation on the ground of relevancy and materiality. The court overruled this objection and allowed the Government an exception.

(270) The stipulation received in evidence as Defendants' Exhibit 5 was a stipulation that the profit and loss comparison for the years 1927 to 1931, inclusive, for the bituminous coal companies named in the attached tables were correctly shown in said tables. Counsel for the United States objected to the admission of this stipulation on the ground of relevancy and materiality. The court overruled this objection and allowed the United States an exception.

(272) Counsel for the United States then offered in evidence a stipulation between the parties. He stated that it related to the contents of Defendants' Exhibit 4 and contained information taken from the same source as that on which said exhibit was based, but that it also showed the gross income of the bituminous industry and the percentage of its gross income to its net deficit for the year 1929 and gave similar data for certain other industries. This stipulation was received in evidence as Government Exhibit 16 (273).

Counsel for the defendants then offered in evidence a stipulation between the parties showing the net income or deficit for the year 1929, as shown in unaudited Federal income tax returns, of all companies which reported income tax data in such returns. He stated that this exhibit covered all industries for which figures are available. This stipula-
[fol. 356] tion was received in evidence as Defendants' Exhibit 7.

WILLIAM JAMES MCGARRY, a witness called on behalf of the defendants, testified:

Direct examination.

By Mr. Donovan:

I live at Washington, D. C., and am manager of the Open Top Section, Car Service Division, (274) American Railway Association. That is a voluntary association of all of the railroads of the United States and Canada to coordinate and harmonize, by cooperation, practices and methods with respect to operation, maintenance and construction. I have been connected with the association since March 1, 1920. Prior to that I was assistant superintendent of Car Service of the Lackawanna, superintendent of Car Service and superintendent of Transportation of the Lehigh Valley, and manager of the Car Service Section of the United States Railroad Administration.

In my present position my duties are the equitable distribution of open top cars as between railroads, and especially during times of car demand. That distribution is made on the basis of ownership of the railroad, the orders for cars, and the orders in turn are based on the rated capacity of the

mines, with particular reference to cars required for coal loading. I am familiar with the basis on which allotments of railroad cars are made by individual roads to producers of coal. Those allotments are made on the basis of the mine rating. (275) The authority for these allotments is contained in Section 12 of the Transportation Act of March 1, 1920, which requires all railroads to maintain mine ratings and to distribute cars equitably between mines on the basis of the rating.

Up to and including 1923 it was a foregone conclusion, almost yearly, that there would be a shortage of cars for [fol. 357] coal loading during the period of seasonal demand, and more or less complaint was registered with respect to the ratings maintained by the railroads. It was claimed that certain mines, with or without the connivance of the railroad would maintain fictitious ratings in order to get more than their proportionate share of the car supply. The Interstate Commerce Commission took cognizance of that and instituted under Docket 13,896 a proceeding that extended to 1926. During that proceeding the coal operators, the Railroad Committee, and the American Railway Association got together and developed a recommended practice for the rating of coal mines.

(276) The rating is based, first, on the physical conditions. Physical conditions have to do with whether it is a slope or strip or shaft mine, the number of openings, the length of haul from the workings to the mouth of the mine, and any other physical conditions that might affect operation. Second, on past performance. By that is meant what the mine can do over a period of consecutive days with a full car supply. Third, on labor supply. This, of course, is a very important condition, because even though a mine could turn out a given number of cars per day, if it did not have the men to do this, it would be helpless. Fourth, on all other factors that might influence production. That was submitted to and approved by the Interstate Commerce Commission and incorporated in its decision in Docket 13,896 rendered in 1926.

The original and basic figures in the matter of supply and mine ratings, allocations, etc., are obtained from the railroads by the American Railway Association. They are collected and put together and submitted to the Interstate Commerce Commission to keep the Commission informed of

what is going on. In the event that there is any shortage complained of directly to the Commission, they confer with us and find out what we know about it before taking action. [fol. 358] In peculiar conditions there have been times, like the English strike, when we were in conference with the Interstate Commerce Commission every day in order to do everything that could be done to enhance production, so as to meet the demand. (277)

The railroads keep statistics regarding the production of coal mines. The information with respect to the orders for cars, the number supplied, the percentage of distribution, the number loaded, and the coal produced, is reported by the railroads to the Car Service Division, which throws the information together for all railroads and submits it to the Interstate Commerce Commission and to the Bureau of Mines of the Department of Commerce.

I have prepared a compilation which shows the average weekly production of bituminous and lignite coal from 1920 to 1931, inclusive. The purpose of the compilation was to determine what might be expected as the figure, or the amount of coal necessary, to meet the requirements of the country. The figures show that over this period of 12 years the average weekly production was 9,532,000 tons, which we accepted as being the normal requirement in normal times. That would average a yearly production of 595,664,000 tons, which is approximately the 500,000,000 tons accepted as being the requirement of the country under normal conditions.

The tabulation was compiled from the reports prepared by (278) the railroads, the cars loaded at the mines served by them, and it was presented to the Car Service Division. To that was added the figures obtained by the Bureau of Mines, showing coal consumed locally and coal transported other than by the railroads, for example, river coal and coal that was trucked. This gives the total production of the bituminous coal industry.

I have compiled a table showing the production of bituminous coal for the weeks ending September 4, October 2, November 6, and December 4, 1926. The production during [fol. 359] the week of September 4, 1926, was 10,921,000 tons, or 14.5% in excess of the average weekly production over the 12-year period. By December 4, 1926, that production had been increased to a total of 14,551,000 tons, an increase of 33.2% over the production of the week of Sep-

tember 4, 1926. (279) The purpose of preparing that statement was to show the extent to which the production of bituminous coal can be stepped up when the demand requires it and the labor supply is available to produce it.

I have also prepared a chart showing the production of bituminous and lignite mines, by States, for the week ending December 4, 1926. (280) These figures were obtained in the same way that I have previously described. Figures are obtained weekly, excepting that after we had obtained figures of the car loadings on the railroads, there was added to them coal used locally and transported by truck and by river as shown by the Bureau of Mines reports breaking down the total production by States. The production for the week of December 4, 1926, represents an increase of 52% over the average production for the period of 12 years.

I have also a statement with reference to eastern Kentucky, southern West Virginia, Tennessee, and Virginia. There are included in this the Tug River, Thacker, Clinch Valley, and Pocahontas districts, and possibly one other on the Norfolk and Western Railway; New River, Kanawha, Logan, and eastern Kentucky on the Chesapeake and Ohio Railway; Hazard and Harlan, and the Knoxville-Atlanta district on the Louisville & Nashville Railroad; the Virginia districts on the (281) Clinchfield, Interstate and Southern Railways; and the Tennessee districts on the Nashville, Chattanooga and St. Louis Railway and the Tennessee Central. I have prepared a table showing the total productive ratings in tons for active and inactive mines in this area. There are 582 active mines, with a total [fol. 360] weekly rated capacity of 3,611,190 tons. The railroads serving this area are carrying in their records at the present time a total of 410 inactive mines, with a weekly rated capacity of 1,104,840 tons, making a total of 992 mines, active and inactive, with a weekly rated capacity of 4,716,030 tons. (282) That actual production of these mines for the week ending December 4, 1926, was 3,806,000 tons.

I have also prepared a table showing the total productive rating in tons of all bituminous coal mines in the United States for the week ending July 2, 1932. The total weekly rated capacity of the active mines in Alabama is 316,000 tons. The inactive Alabama mines carried on the railroad's rating bulletins have a weekly rated capacity of 117,100 tons, making a total weekly rating of 433,900 tons. The

production of the Alabama mines during the week of July 2, 1932, which is the last week we have available, was 82,600 tons, as compared with a total rating of 433,900 tons, and a total rating of active mines of 316,800 tons. That is not as big as it was in 1926. (283) The weekly rating of 433,900 tons means a production of 225,628,000 tons for a year of 52 weeks.

I have also a table giving a further refinement of the rating of the mines in eastern Kentucky, southern West Virginia, Tennessee, and Virginia. I have previously testified that the total rated capacity of the 992 mines, active and inactive, in this territory was 4,716,030 tons per week. Of that total capacity the railroads list 245 mines with a weekly rating capacity of 1,460,460 tons as Smokeless mines, which I understand are not included in this proceeding. In addition to that, the railroads list 449 mines with a total rated capacity, active and inactive, of 1,589,630 tons. The total rated capacity of all mines in the territory described would be 4,716,000 tons on a weekly basis, or 245,233,560 tons on a yearly basis. From that deduct the weekly rating covered by the Smokeless mines, of 1,460,460 tons, or a yearly pro- [fol. 361] ductive capacity of 75,943,920 tons. The difference between the two figures represents a weekly production of 3,255,570 tons, or a yearly productive capacity of 169,289,640 tons. Of this 169,289,640 tons, the productive capacity of non-member mines other than Smokeless is 1,589,630 tons weekly, or 82,660,760 tons yearly. (284) The rated capacity of the mines represented by Appalachian Coals, Inc., is then 1,665,940 tons weekly, or 86,628,880 tons yearly.

(285) I have some figures indicating that since the peak period of 1926 there have been dropped from the mine rating bulletins of the Chesapeake & Ohio a total of 136 mines, from those of the Louisville & Nashville a total of 182 mines, and from those of the Norfolk & Western a total of 103 mines, making the grand total of 421 mines that had been dropped out of a total of 1330 that were carried in the bulletins as of December, 1926. We have no information to indicate what was the average rating of those 421 mines. They are not now included. But assuming that each of those mines could be brought back into production under the stress of demand and could produce an average of 3 cars per day each, which is a very low production, the

production for the area would be augmented by 378,900 tons per week, or 19,702,800 tons per year. We have no figures to separate that as between Smokeless and others, members and non-members. But in the ratio that those figures bear to one another as presented in previous statements, I would say that it was a reasonable assumption that the decrease in the number of mines in that area was somewhat on the same basis.

I have also prepared a table to show, by States, the percentage decrease in coal production in December, 1930 (286), as compared with December, 1926. Production in the States of Arkansas, Montana, North Dakota and Utah shows an increase in 1930 as compared with 1926. Production in Michigan is about even. In other States the percentage decrease was as follows:

Washington	1.6
Oklahoma	6.8
[fol. 362] Missouri	12.9
Wyoming	14.5
Iowa	16.9
Colorado	21.
Tennessee	22.7
Eastern Kentucky	26.6
Maryland	26.8
Virginia	31.3
Ohio	32.7
Northern West Virginia	35.8
Pennsylvania	36.2
New Mexico	39.7
Alabama	39.9
Indiana	42.1
Illinois	43.
Kansas	44.
Western Kentucky	49.1
Texas	56.7

The purpose of this statement is to show, or to indicate, that if the stress of demand or occasion required, production in those States could be augmented in the proportions by which they have decreased since 1926.

(287) The tables presented by the witness were received in evidence as Defendants' Exhibit 8, and were marked respectively 8-A, 8-B, 8-C, 8-D, 8-F, 8-G, 8-I, 8-J, 8-K.

(383) Cross-examination.

By Mr. O'Brian:

In table 8-C, I used the dates of September 4, October 2, November 6, and December 4, 1926. (385) In table 8-D I used as a basis for my ultimate comparison the production for the week of December 4, 1926. In table 8-I I used the production of the week of December 6, 1930, as compared with the week of December 4, 1926. In table 8-K I compared the number of mines, active and inactive, carried currently in mine rating bulletins with December, 1926. In 1926 there was a progressively increasing abnormal condition in the coal industry. That was chiefly due to two great strikes, (386) the anthracite strike and the British coal strike. When I took as the basis of comparison the first week of December, 1926, I took a week at about the time of the peak of those abnormal conditions.

[fol. 363] Q. In the month of November, as shown by this publication of the Bureau of Mines, Coal in 1929, edited by Mr. Tryon, does not this show that in the month of November, 1926, $3.19 a ton was the market price for coal?

A. If it is there, I would say so, but I have not testified anything to that effect.

(387) During December, 1926, we reached the peak production for any one week in history, but I am unqualified to say anything with respect to price.

Counsel for the United States stated that counsel have agreed that either side may use standard statistics. (388) He stated that the publication, Coal in 1929, shows that the average November price for bituminous coal was $2.25 in 1923, $2.06 in 1924, $2.26 in 1925, $3.19 in 1926, the basis of comparison here, and $1.90 in 1927; that it shows that in 1926 the average price was $1.92 in April, $1.93 in May, $1.90 in June, $1.91 in July, $2.00 in August, $2.15 in September, $2.70 in October, $3.19 in November and $2.53 in December; (389) that it also shows that exports of bituminous coal from Hampton Roads were 4,260,319 tons in 1925, 12,205,000 tons in 1926, and 2,587,847 tons in 1927.

(390) Q. When you said the purpose of offering this testimony was to show, as I understood you, the mines that would go back into production when a proper demand ap-

peared, were you assuming that that would require a peak demand plus $3.19 a ton, in order to bring that capacity back into production?

A. The $3.19 per ton can be eliminated because I know nothing with respect to price. I was not assuming anything in the presentation of these figures. I was merely attempting to show what could be done when the demand for coal justified the mines going into production, of course, it does not require any knowledge of the coal business to know that when there is a great demand for coal, the price increases. But it does not necessarily follow that if certain mines went into production in competition with others, that would [fol. 364] mean an increase in the price, unless the demand was such that all mines would have to work to justify the price.

(391) Redirect examination.

By Mr. Donovan:

The purpose in selecting those particular dates as a basis of comparison was to show by actual periods what the mines of the United States were capable of, first, on the basis of potential capacity as shown by the ratings, which would be in conformity with the methods prescribed by the Interstate Commerce Commission, and in addition to that, to show during a period of abnormal demand imposed as a result of the English strike and the anthracite strike, that the mines had actually produced 14,151,000 tons of coal in one week, or 52% in excess of the average weekly requirements of the country over a period of 12 years. I selected the dates by design and purpose to show what the record actually was. I do not see how I could show what the maximum production was unless I showed it during the period of maximum demand and abnormal conditions. (392) I selected the dates on my own initiative.

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(288) Howard N. Eavenson, called as a witness on behalf of the defendants, testified:

Direct examination.

By Mr. Donovan:

I live in Pittsburgh, Pennsylvania, and am a mining engineer and coal operator. A map was prepared in my office,

under my direction, from the material that has been stipulated. This map was received in evidence as Defendants' Exhibit 9. The base of the map is a railroad map of the United States prepared by the Engineers Office of the United States Army. (289) On that we placed gray areas showing the known coal areas as they are specified by the United States Geological Survey. The section in Illinois, western Kentucky and Michigan is the eastern interior region that was referred to by Mr. Tryon, with several small areas in western Tennessee and in Mississippi. This portion west [fol. 365] of the river is the Central interior area reaching from northern Iowa down to Texas. The section in North Dakota, into Montana and down through Utah, Colorado and New Mexico, is the Rocky Mountain area and the territory in Washington is the Pacific coast area. On those the actual producing section is shown by cross-hatched lines so that the area which is actually producing coal can be distinguished from the part that is undeveloped. The portion of the Appalachian area that is covered by Appalachian Coals, Inc., is shown in a bright red tint reaching from southern West Virginia down across the extreme southwestern tip of Virginia into eastern Kentucky and down into Tennessee. (290) That is what has been referred to here as Appalachian territory although that particular part is the portion of it that is occupied by the 24 counties referred to in this case. The red area is confined solely to the defendants, that includes both the defendants and the non-defendants in that area. Strictly speaking, the whole gray area around it is Appalachian area.

(291) We appropriated the name, Appalachian Coals, Inc., when this organization was formed, which covers really only the central portion, or what is ordinarily known in the trade as the southern high volatile section. The producing fields shown in that portion are in red, beginning with the Kanawha, which is in the northeastern end of the southern part of West Virginia, then the Logan, Williamson, Hazard and Harlan districts, the southwest Virginia district, and the southern Appalachian district in Tennessee. All of the 8 producing districts, as they are called in the trade, are included in this red area, covering not only the mines that are in Appalachian Coals, Inc., the selling agency, but also the other mines and the captive mines that

are not in it. In the pleadings in this case the term "Appalachian territory" has been confined to the red area.

In each State we have put the number of tons it used in 1929, because that was the last year in which any study was made, and the number of tons used which were produced by [fol. 366] Appalachian territory (292) not just Appalachian Coals, Inc., and the percentage which the latter is of the former. If no coal from Appalachian territory was shipped into a State, that is indicated. In South Dakota the number of tons used was 721,000. The portion of that coming from Appalachian territory was 68,000, or 9.4%. In Nebraska the number of tons used was 3,588,000, of which Appalachian territory shipped 17,000, or .5%. In Kansas the number of tons used was 2,367,000, of which Appalachian territory shipped 6,000, or .3%.

These figures are based upon the railroad shipments alone, so that they are not exactly correct. In other words, there is no breakdown of the coal that was shipped to the lake ports and distributed from there. The map shows that North Dakota used 1,447,000 tons, none of which was shipped from Appalachian territory. There was actually some coal moved from the lake ports into that territory for which we could not get the figures. The same is true for Minnesota. It used 1,655,000 tons, of which Appalachian territory shipped 237,000, or 14%. The total shipments to lake ports in 1929 were 39,204,000 tons, of which Appalachian territory shipped 17,172,000, or 43.8%. A great deal of that went to Duluth and Superior and points at the head of the lakes, some to Chicago, Milwaukee, Detroit and other points on the other two lakes, and was distributed from there. The Chicago district used 32,254,000 tons, of which Appalachian territory shipped 7,400,000 tons, or 23%. That is differentiated from the rest of Illinois because it is such a large market for all classes of coal.

(293) New England used 3,874,000 tons, representing all rail shipments, of which Appalachian territory shipped 7,600, or .2%, but in addition to that, of the 7,200,000 tons shipped to tidewater 717,000 tons, or 10%, were from Appalachian territory. Of these tidewater shipments about 2,500,000 tons went to New England, about 1,300,000 tons to New York, and other amounts to Philadelphia and points between New York and the tidewater ports.

[fol. 367] The total railroad fuel is shown below as 120,000,000 tons, of which Appalachian territory shipped a little over 17,500,000 tons, or 14.6%.

The colored areas are based upon freight rates. In Central Freight Association territory and territory west of that the basing rates, as fixed by the Interstate Commerce Commission a number of years ago, are the rates from the Ohio districts. The districts east of the Ohio districts and nearest to them, in western Pennsylvania, West Virginia, eastern Kentucky and northeastern Tennessee, are known as the Inner Crescent. That territory covers most of Appalachian Coals, Inc., and it runs up into western Pennsylvania. The districts roughly parallel to them, but immediately east and farther away from the Ohio districts, are known as the Outer Crescent. This green area which extends over Ohio, Indiana and Illinois, marked "1," is a territory in which the rates from the Ohio districts are 25¢ per ton less than from the Inner Crescent mines and 50¢ a ton less than from the Outer Crescent mines. (294) For example, if the rate to a point in that area is $1.75 per ton from Ohio, it would be $2.00 per ton from the Inner Crescent, or most of Appalachian territory.

The terms "Inner Crescent" and "Outer Crescent" were established by the Interstate Commerce Commission in rate cases. The boundary between the two is established in the rulings of the Interstate Commerce Commission, based on the producing districts. (295) The Tug River and Pocahontas districts are in the Outer Crescent and Kanawha district is in the Inner Crescent. That is fundamentally because the former districts are farther away on a mileage basis. For example, the western Pennsylvania districts, and the Pittsburgh district, are in the Inner Crescent and central Pennsylvania districts in the Outer Crescent. The latter are farther away. Except in southwestern Virginia mines in the Outer Crescent are all low volatile. [fol. 368] That factor, as well as the mileage, entered into the distinction.

In the yellow area, marked "2", covering northwestern Ohio, northeastern Indiana and Lower Peninsula of Michigan, rates from the Ohio districts are 50¢ a ton less than from the Inner Crescent and 75¢ a ton less than from the Outer Crescent. In the orange area, marked "3", extending

to the west end of the Dakotas, Nebraska and Iowa, rates from the Ohio districts are 35¢ a ton less than from the Inner Crescent and 60¢ a ton less than from the Outer Crescent (296). In each of those districts there are some slight irregularities of only a few cents a ton from certain districts, but generally these rate differences apply to all of them.

In the Carolinas and Georgia the freight rates are based upon the Coal Creek district, which is the extreme southern end of this red Appalachian area and which was the oldest field developed in Tennessee. In the area colored brown, and marked "4", rates from the Pocahontas and New River districts, which are just east of our section, are 20¢ a ton less than from Coal Creek, 20¢ a ton less than from this part of Appalachian territory. In the area colored orange, and marked "5", rates from the Pocahontas and New River districts are the same as from Coal Creek. In the green area, marked "6", rates from Pocahontas and New River are 20¢ a ton more than they are from Coal Creek. That is the portion of the territory where there is a uniform differential in the rates. In western North Carolina and the extreme northern portion of South Carolina there is no uniformity about the rates.

In the territory colored yellow, and marked "7", rates from the Birmingham district in Alabama are from 5¢ a ton lower to 45¢ a ton higher than from Coal Creek. In the territory colored brown, and marked "8" (297), rates from the Birmingham district are 15¢ a ton less than from Coal Creek (298). In the territory colored green, and marked "9", rates from the Birmingham district are from 20¢ to 70¢ a ton less than from Coal Creek. In the colored areas [fol. 369] from "4" to "9", the rates from the southwest Virginia district, which is the eastern portion of Appalachian territory, are the same as the Coal Creek rates, from Pine Knot and Jellico in Appalachian territory they are 10¢ a ton more than from Coal Creek, and from Harlan and Big Sandy, which are in eastern Kentucky in Appalachian territory, they are 20¢ a ton more than Coal Creek. From the Kanawha, Logan and Williamson districts in Appalachian territory the rates are 10¢ a ton higher than from Pocahontas.

At the top of the map we have shown the tonnage of each producing district. In order to avoid complications we have

grouped several producing districts together. In western Pennsylvania, covering the Pittsburgh, Butler, Mercer and Freeport districts, the production in 1929 was 93,281,000 tons, while central Pennsylvania had a production of over 50,000,000 tons. Ohio No. 8 and the West Virginia Panhandle produced over 18,750,000 tons. Other Ohio districts produced 11,300,000 tons. Northern West Virginia in and around Fairmont produced 2,217,000 tons, the Smokeless fields in southern West Virginia 56,374,000 tons, northeastern West Virginia and Maryland 4,300,000 tons, and Appalachian territory 93,900,000 tons (299). The production in Illinois is divided into several districts, in the northern part, 1,787,000 tons, in the central part 3,049,000 tons, around Peoria 310,000 tons, and in the central and southern part 51,700,000 tons. In Indiana the production was 18,344,000 tons, in western Kentucky 14,400,000 tons and in Alabama 17,188,000 tons. We did not put on the map the production of States west of the Mississippi River because that had no bearing on this case. Whereupon, the map referred to was offered and received in evidence and marked Defendants' Exhibit 9 (309).

Cross-examination.

By Mr. O'Brian:

The reason why the map does not bring out clearly the territory in the western part of North Carolina, and in South Carolina, where Appalachian territory has favorable freight rates is because the rates to certain places there vary from the different producing districts, and there is no [fol. 370] way to show it inasmuch as there is no uniformity there at all. Defendants' Exhibit 3, page 50, shows that the lowest rate to Charlotte, North Carolina, is from the Virginia district in Appalachian territory and that it is $2.87 a ton and that the lowest rate from outside districts is $3.04 a ton from certain Middle Tennessee districts. Page 51 of this exhibit shows that the lowest rate from Appalachian territory to Asheville, North Carolina, is $2.19 a ton and the lowest outside rate, the Middle Tennessee rate, is $2.37 a ton. Page 52 shows that the lowest rate from Appalachian territory to Columbia, South Carolina, is $2.42 a ton, and the Virginia district $2.93, as against the lowest

outside rate, from Middle Tennessee, of $3.09 a ton. Page 53 shows that to Spartanburg, South Carolina, the lowest rate from Appalachian territory is $2.53 per ton and the lowest outside rate, from middle Tennessee, is $2.70 a ton. (301) Page 57 shows that the lowest rate from Appalachian territory to Greenville, South Carolina is $2.53 a ton, as against the lowest outside rate, from middle Tennessee, of $2.70 a ton. The reason this is not shown on the map is that it is not uniform and is on entirely too small a scale to distinguish between rates. This territory that we show is where there is a fixed differential, and there is nothing of that kind in this section.

The production shown on the map as Southern Appalachian and Jellico in Kentucky and Tennessee, 7,530,000 tons, should be included in Appalachian territory, but they were grouped separately partly on account of rates.

(302) The freight differentials shown on the map are figured on the difference in rates on coal originating in Appalachian territory and coal originating in some other area. They are fixed by the Interstate Commerce Commission, whether the basic rates themselves are fixed by the Commission or not. The Commission drew a line covering certain railroads in certain territories, and inside that it covers all rates.

[fol. 371] (304) All of Appalachian territory excepting the Virginia district—that is, one out of eight districts—is in the Inner Crescent and the Virginia district is in the Outer Crescent. (306) In the northern States the rates are compared with those from Ohio. In the southern States the rates are compared partly with those from Coal Creek and from Alabama.

(308) The freight differentials shown on the map do not apply to shipments to lake ports. As to these shipments, the rates from the Pittsburgh district in western Pennsylvania are 35¢ a ton lower than from Appalachian territory. The Interstate Commerce Commission has made zones for lake port shipments entirely different from those for all-rail shipments. If there is an all-rail shipment from the Pittsburgh district to Minnesota, it goes under the freight differentials shown on the map, but if it goes to a lake port and thence by water, it goes under an entirely different system of rates. If it goes all-rail to Minnesota it goes on the same rate as from Appalachian territory, but if it

goes via a lake port, Pennsylvania has an (309) advantage of 35¢ a ton over Appalachian territory.

(310) The map shows that in 1929 South Carolina used 2,400,000 tons, of which 2,295,000 tons, or 96%, come from Appalachian territory, that in Georgia 84% of all the coal used was from Appalachian territory, and that in North Carolina 68% of all the coal used was from Appalachian territory. Those percentages represent the shipments of all producers in Appalachian territory and not simply those represented by Appalachian Coals, Inc.

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(351) E. S. Moore, a witness called on behalf of the defendants, testified:

Direct examination.

By Mr. Donovan:

I reside at Roanoke, Virginia, and am coal traffic manager of the Norfolk & Western Railway, which runs through Appalachian territory. (352) I have to do with the purchase of coal for our railroad. It uses bituminous [fol. 372] coal, both low and high volatile. At the present time we are consuming 2,000,000 tons a year. We go to a peak of about 3,000,000 tons. We buy the low volatile coal in the Pocahontas district and the high volatile coal in the Clinch Valley, Kenova, and Thacker districts, which are in this Appalachian territory. In addition, we produce at mines owned by the railroad a substantial amount of our total requirements. The railroad mines are in the Thacker and Kenova districts.

Our mines produced in 1929, which was a fairly good traffic year, 1,450,000 tons. We consumed (353) that year 3,132,000 tons. Fuel produced at our mines represented in that year 46.3% of the total. In 1931 our consumption of fuel dropped to 2,108,000 tons, and our mines, which were put on a restricted production basis, furnished 948,000 tons, or 45%. Our mines have at present a capacity for producing 1,500,000 tons of coal annually, which can on short notice be increased. That could be increased, at moderate expense, to meet all our requirements. The expense of this would depend on the total tonnage we wanted

to get out—say $50,000 to $100,000 to get out a reasonable tonnage. That would not increase the cost per ton.

I have prepared a statement comparing the productive capacity of mines operated by members of Appalachian Coals, Inc., with that of non-members. This is compiled from our mine rating sheets, daily rated capacity of the defendant companies whose mines are (354) in current operation, and their inactive mines, and similar information for non-defendant companies. It shows for the defendant companies 40 mines with a daily rated capacity of 766.1 cars, which, translated into annual tonnage, would represent about 11,391,000 tons of coal. There are also 11 inactive mines of these defendants with a daily rated capacity of 85 cars, or an annual tonnage of about 1,275,000 [fol. 373] tons. I am talking about the Clinch Valley, Thacker and Kenova districts of the Norfolk & Western railway which are within the territory which, for the purposes of this case, is designated as Appalachian territory. (355) In the same districts non-defendants have 22 mines with daily rated capacity of 444.5 cars daily, or an annual tonnage of approximately 6,667,000 tons, and 58 inactive mines with a rated capacity of 225.7 cars daily, or an annual production basis of approximately 3,375,000 tons. In the low volatile or Smokeless fields, covering the Pocahontas and Tug River districts, there are 78 active mines with a rated capacity of 2,290.2 cars a day, which would be about 34,000,000 tons annually, (357) and 48 inactive mines with a daily rated capacity of 814.5 cars, or an annual rated production of about 12,000,000 tons. Rated capacity was explained by Mr. McGarry. It is the approximate daily capacity of mines to load coal.

In the high volatile districts there are only 3 operating captive mines, and they are all owned by the railway company for the production of its fuel coal. In the Pocahontas district there is only one active captive mine, and that belongs to the United States Coal and Coke Company. Including these captive mines, there are (358) 22 non-defendant mines in the high volatile districts and 78 in the low volatile districts, or a total of 100. These are active mines. Of the inactive mines, there are 58 in the high volatile districts and 48 in the low volatile districts, or a total of 106. I refer to mines, not companies. The operating daily rated

capacity for all active non-defendant mines is 2,734.7 cars, and for inactive mines, 1,040.2 cars.

Based upon the figures I have recited, I think that the entire fuel requirements of the Norfolk & Western Railway could be adequately supplied by producing companies that have not contracted with Appalachian Coals, Inc. Of the capacity in the high volatile districts that I have indicated, about 13% is represented by captive mines.

[fol. 374] In my experience there has been keen competition in the sale of bituminous coal in the markets in which our company has purchased that coal. (359) We have bought coal, and do buy coal, both from companies which have contracted with Appalachian Coals, Inc., and those which have not. We have not felt that Appalachian Coals, Inc., would give us any trouble in our railway fuel purchases, first because if we did not care to pay the prices asked, there are a number of other producing companies outside of Appalachian Coals, Inc., from whom, no doubt, our coal could be purchased; or, otherwise, we could mine our own coal and produce at our own properties all coal required, and could do so at a reasonable cost.

Cross-examination.

By Mr. O'Brian:

My testimony is all based upon the rated capacities of mines, (360) and not on the actual production except as that is figured in the formula applied by the Interstate Commerce Commission. The mines referred to are all on our line. There is no other railroad available to these mines; we have no joint mines. (361) The table from which I have testified is an estimate arrived at by taking the rated capacity of the mines as fixed by the Interstate Commerce Commission, but it is very close to actual capacity. The table was then copied into the record as follows (362, 363):

Norfolk and Western Railway Company

STATEMENT SHOWING COMPARISON OF CAPACITY AND MINES OPERATED BY MEMBERS OF APPALACHIAN COALS, INC., AND BY OTHERS

(Inactive mines include all mines formerly operated which have remaining coal and from which tipples have not been removed, according to Railway records.)

[fol. 375]

	Mines operating		Mines inactive	
	Number	Daily rating (cars)	Number	Last Daily rating (cars)
Defendant Companies:				
Clinch Valley District	4	56.8	3	22.1
Thacker District	26	532.1	5	30.5
Kenova District	10	177.2	3	32.4
Total	40	766.1	11	85.0
Non-defendants:				
Clinch Valley District	9	110.3	24	59.6
Thacker District	9	268.9	18	123.0
Kenova District	4	65.3	16	43.1
Total	22	444.5	58	225.7
Pocahontas District	52	1,693.5	24	646.7
Tug River District	26	596.7	24	167.8
Total	78	2,290.2	48	814.5
Grand Total Non-defendants	100	2,734.7	106	1,140.2
Grand Total—All	140	3,500.8	117	1,025.2
Captive mines included above—Non-defendants:				
Pocahontas District—(U. S. C. & C. Co.)	1	68.0	10	492.2
Thacker-Kenova—(N. & W. Ry.)	3	59.4	1	19.5
Total	4	125.4	11	511.7

(364) By Judge Soper:

Q. Why do you mine any of your own coal under present conditions? Why do you not buy all of your coal at the less than the cost of production prices that are prevalent?

A. We were forced into mining our own coal about 1917 on account of the then existing very high price. We felt that as a matter of reasonable economic operation we had that to do, so we acquired very extensive properties for that purpose, and it is a thing that having gotten into once it is very hard to get out of. It would probably be hurtful to the regions where these mines are located were we to shut them down today. It would probably create a very [fol. 376] bad labor condition, because the other mines could by no manner of means absorb the labor. We have, however, very greatly curtailed the operations of the mines.

Q. Which costs you the most: the coal that you buy on the market or the coal that you get out of your own mine?

(365) A. That cost has for the past two or three years been approximately the same. Perhaps though, I had better make clear to you that the Railway Company buying as it does on contract can not participate in some of the very

cheap prices at which coal is sold spot. Naturally a contract price over a period of time under existing conditions would carry more money.

Q. And if you could assume that the good times of the past would return when things would be prosperous generally, and there would be a large demand for coal, would you feel entirely comfortable as a large consumer of coal under such conditions, with a common sales agent controlling 73 per cent of the production, or more than 50 per cent of the capacity?

A. You are speaking with respect to our fuel coal?

Q. I am speaking about you as a purchaser of coal. You said you did not think it would make any difference to you. You felt entirely happy with the present arrangement of Appalachian coal. Now I am trying to get you to put yourself into the position where the economic conditions are reversed, and instead of being a time of deep depression we would be in a time of high prosperity.

A. We would be very glad to see it. We would not fear it because we could mine from our own properties all the coal that we would require and at a figure much less than what the probable market then would be.

Q. And if you did not have mines, if you were not in the fortunate position of a mine owner but merely a large consumer of coal how would you feel about it then?

[fol. 377] A. A railroad in any event, especially the foreign (366) railroads who come on to another man's railroad to buy coal must in any event always, good times or bad, pay the market price for coal.

Q. Everybody has got to do that, I assume.

A. Yes.

Q. Well, that is your answer, is it?

A. Yes, if I got your question correctly.

By Judge Northcott:

Q. I want to ask you this: I do not think you got Judge Soper's question, and I do not think you answered it. I would like to have you answer it. If you did not have mines of your own and the coal business went back to normal for coal business, and the Appalachian Coals was incorporated, do you feel that it would affect you on the open market without any mines of your own, organized as it is, and make the price higher to you as a consumer?

A. That is a matter of opinion. I do not know that it would.

Q. Well, that is just what I am asking you, is your opinion. You have given some opinion testimony here.

A. The probable future market conditions and the effect on such a market of Applachian Coals is rather hard to guess.

Q. You do not care to answer that?

(367) A. I am trying to as best I can, as I gather your question. A railroad with no mining properties of its own would have to go to its natural source of origin for coal and whatever would be the market price at that time they always have to pay it.

Q. Here is a company that controls 73 per cent of the coal in that territory, and 27 per cent outside of the sales agency. Would you feel perfectly happy, to use your own language, about having it organized if you did not have mines of your own?

A. Speaking for the Norfolk & Western—and these mines [fol. 378] all being located on our railroad, that it about which I have testified—I think we would be happy. It would not cause any particular concern because we would know that it we did not like the Appalachian price there is yet much available coal property, and I do know of individuals who would be perfectly willing to open up such properties and produce railroad fuel. In fact, we have one shipper on our railroad who persistently refuses, for good reasons of his own, to get into the commercial coal business and makes a special effort to sell only railroad fuel because he does not care for the expense that goes along with selling commercial coal.

Most of our mines were bought in 1917. We bought some property in 1921, but none since.

(368) If the Smokeless field were organized as an agency similar to Appalachian Coals, Inc., and assuming that it controlled 70% of the output of that field, so that we had the Appalachian field and the Smokeless field both organized with that degree of control, I think that we would be just as happy as we are now. I would not say that it does not make any difference to us what degree of control is exercised in those two fields. I would not be in a position to say what degree of control there would give us concern. I feel, as a matter of business judgment, through long contract with the

coal trade, that as long as about 25% are sticking out and are selling their own coal in their own way, you will always have the opportunity to get that coal. Perhaps I would not feel the same way about it if there were only 10% in those fields left outside the selling agencies. The degree of control does make a difference in my attitude.

(369) In contracting for our coal, we do not take into consideration the amount of traffic we obtain from the mines. We have paid more than what some people are prone to call the market price of coal.

[fol. 379] Q. Was not one of the reasons why you contracted to pay more than that price, the fact that you would get so much coal traffic from these mines?

A. It was on a little different basis. Boiled down, you might consider it as such. The Norfolk & Western has undertaken to pay what it regards as a fair price for coal.

I do not mean on a basis of philanthropy, but 80% of the traffic handled by us is coal. If our operators are not prosperous, it will follow in due time that the railroad probably will not be prosperous. We mine our own coal. We know what it costs us to mine our own coal, and we know that no operator can mine coal for less money than we can, and we do not think, as a business proposition, we should ask them to take any less money than that. In other words, it is important to the railroad to have this traffic (370) and to have these mines operating. The price that we have normally paid under normal conditions so closely approximates what I would call the ordinary contract price for the kind of coal that we buy, that there is very little, if any, difference. In 1923 it was lower. That was one of the peak years of high prices. We then made a contract for a year at something below the market price on the theory that the high price in the market was a temporary price.

(371) When I said that 80% of our traffic was coal, that was figured on the basis of tonnage, not dollars. The money derived from all miscellaneous freight traffic in 1931, other than coal and coke, was 32.7% of all our freight traffic revenue, and the revenue from coal and coke was about 67% of our freight traffic revenue for that year.

By Judge Parker:

Q. I want to ask you this. In your opinion, Mr. Moore, would the fact that Appalachian Coals, Incorporated, con-

trols 73 per cent of the output of the Appalachian field, and more than 50 per cent of the productive capacity of that [fol. 380] field, enable it to raise the price of coal.

A. I hope so, I do not know whether they can, or not.

(372) Q. If you think that will enable them to control the market price, I would like to have you give your reasons why you think so, and the factors upon which you base that opinion.

A. I merely said that I hoped so, your Honor. The competition in coal all over the country is very keen. All this coal, including our Smokeless coal, is in active competition with Illinois coal, Indiana, Southern Ohio, Northern West Virginia, and Pennsylvania, both on Lake cargo coal, and on all-rail coal, to a territory in the West that may roughly be described as from Pittsburgh to and including Minnesota, South Dakota, Nebraska, and Iowa. Likewise, that coal, insofar as our railroad is concerned, is in very active competition with (373) the L. & N., especially their Eastern districts, and you high volatile coal in this Appalachian Coals, if the price increased, would immediately come in conflict with, you may say, or competition with, the Smokeless coals. I cannot conceive, in my mind, that this Appalachian Coals price is going to go to a point that they are going to let the Smokeless people get a lot of their business. It is a strange thing today that even Smokeless coals in the smaller sizes—spot coal, I mean—are selling at prices unheard of, and at prices higher then similar grades in the high volatile districts. It is a very unusual condition.

By Mr. Donovan:

Q. In other words, as I follow your answer to Judge Parker's question, it is this, that if Appalachian should undertake to raise the price that it wants, it would meet in competition, not only the coal from the non-defendant companies, but from other districts?

A. They certainly would. They would not have to increase the price very far, perhaps, before they settled all the strike trouble in Illinois, Indiana, Ohio and Northern West Virginia.

[fol. 381] By Judge Parker:

(375) Q. So if the Appalachian district is organized by Appalachian Coals, Incorporated, and the northern dis-

trict by another corporation of a similar character, and the various other coal districts are all organized, will such organizations and the control that they would exercise over the supply of coal, in your opinion affect the market?

A. I would question that in my mind, your Honor, because the competition among those selling agencies would certainly be very keen. The trouble with the coal men, or any coal property for that matter, is that they want to run every day; it is very important that they do run as regularly as they can on account of the element of cost. And knowing as I do how a lot of coal people today compete with one another in order to obtain better running time, I can not concerve that large producing districts, for instance like (376) Pennsylvania, are going to let get away from them any business they can get.

Q. In other words, you thing that the competition between selling agencies would keep prices within a reasonable range of the cost of production?

A. I should think so.

When I said Smokeless coal was now selling higher than Appalachian coal, I was talking about the finer sizes of Smokeless coals today selling so low, and lower than much good grade of slack coal, for instance, for high volatile properties. Smokeless coals are selling for less, in certain grades, than the Appalachian. Commonly Smokeless coal sells for more, and it would during any period of great demand for coal. Prices would probably be a little higher —not so much so, however, for slack coal. That is more true of the domestic sizes. One reason why Smokeless coal generally sells higher than high volatile is that, in so far as domestic coal is concerned, it is practically smokeless, as its name implies, and it is the kind of coal that people [fol. 382] want for that purpose. Much of your selling of low volatile coal is that which is required by your by-product industry. Smokeless coal is low volatile. Smokeless coal commonly carries a higher heat value than other coal and it can be used for steam purposes.

By Mr. O'Brian:

Q. One other question: Going back to your opinion, is it your opinion that the organization of Appalachian Coals, Incorporated, and Smokeless Coals, assuming that that is

similarly organized, will have no effect whatever upon the price of coal in their territory? Or is it your idea that the effect will not be an injurious effect to the market?

A. There probably would be some effect in the price of coal, but I can not say that——

Q. (Interposing.) Well, at least it won't lower the price any?

A. That depends to an extent on business conditions.

Q. Of course it does. But then your opinion is based, is it not, on the assumption that while the organization of these selling agencies will in your opinion affect the market, you don't think that the extent of that result will seriously affect competition, is that it?

A. I can not see it.

Q. But assuming that the effect were large enough the result might be a serious one on the market, might it not?

A. Well, of course you don't necessarily need to restrict your imagination. Things can and do grow some times.

Q. Yes.

A. But I can not see it.

Q. By saying you cannot see it you mean in your opinion that although this plan, and I want to base your position correctly and if I do not I want you to correct me, that although this plan in your opinion will probably raise the [fol. 383] price of coal, it will not raise the price of coal to a great extent because of the competition that will come in when that price is raised sufficiently, is that about it?

A. I feel that competition would reasonably control it. I would look upon it as such from the standpoint of our railroad.

Q. You have been assuming, of course, that the organization of this agency is likely to increase the price of coal somewhat.

A. It may do so.

Q. Well now, do you think that is a fair answer? Aren't you assuming in fact that it will?

A. I stated originally that I hoped so. But I can not say that it will. It possibly might do so.

Q. Now, I asked you if you were not assuming that it would, and I thought you said you were but that you were assuming it would not raise it greatly.

A. I don't think I have said anywhere that it would do so or that I assumed it would.

Q. Well, you say you don't think it will raise the price at all, will you say that?

A. No, I will not say that.

Redirect examination.

By Mr. Donovan:

(378) If each of these district selling agencies were to come into being and attain 100% representation, it is my opinion that competition would not cease in the common market in which these agencies necessarily meet. There would still be a great deal of competition. There is bound to be. They all sell substantially in the same market. I am talking about Illinois, Indiana, southern Ohio, northern West Virginia and Pennsylvania. A very large percentage of that coal is sold in what you might describe as the common market. (379) To an extent there are markets in which certain of these coals do not compete with each other at all.

Recross-examination.

By Mr. O'Brian:

(381) I do not wish the court to understand that Ohio or [fol. 384] Illinois coal is a competitive factor today under existing freight rates in the South Carolina market. The percentage figures for Appalachian coal used in South Carolina shown in Defendants' Exhibit 9 look high, but it is not much coal. In answer to the question as to the [fol. 385] effect of the organization of these various producing districts, I said that their primary territory for disposing of coal is east of the Mississippi River on up to Pittsburg. Our coal does move in substantial quantities into all that territory.

Defendants' Exhibit 9 does not show the figures for Smokeless coal. This coal is included in the totals, which are shown in this exhibit. If (382) your Smokeless figures were separated they would show up very strong. I am speaking of the consumption in the territory where coal is consumed in volume.

Redirect examination.

By Mr. Donovan:

I cannot answer whether Alabama could get a freight rate into South Carolina that would enable it to compete

there. Oil is a competitor all along the Atlantic coast. It is a factor in South Carolina.

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(312) JAMES D. FRANCIS, a witness called on behalf of the defendants, testified:

Direct examination.

By Mr. Donovan:

I am vice-president of the Island Creek Coal Company and of the Mallory Coal Company, two of the defendant producers, and I am president of Appalachian Coals, Inc. I am also vice-president of the Pond Creek Pocahontas Coal Company, a coal producer in the Smokeless fields. I became connected with the Island Creek Coal Company as counsel in 1912. From 1915 to 1917 I acted as counsel for the Logan and Kanawha districts, two of the districts in Appalachian Coals, Inc., in a series of rate litigations covering a period of two years. Shortly after the end of that litigation, I became vice-president of the Island Creek Coal Company and the Pond Creek Pocahontas Coal Company, two large producers in Appalachian territory. Later I became vice-president of the Mallory Coal Company. [fol. 386] (313) Prior to the time I studied law, for about five years I was a civil engineer doing surveying, railroad location and various work of that character.

My duties as an officer of these various companies are in the executive department and I report direct to the president and through him to the Board of Directors. My duties cover a wide range of activities, including the production, distribution and marketing of our coal. I am familiar with the accounting and operating practices and am in constant touch with the management and the production and sales departments.

I have worked on the freight rate structure from this region since 1915. For the last 12 years I have been chairman of a committee known as the Property Owners' Committee, representing the producers in these 8 districts as well as the producers in the so-called Smokeless fields of West Virginia and Virginia. We have worked constantly on our freight rate structures to markets in all directions.

The question of freight rates is one of the very vital matters to a coal producer, because it limits your markets to a certain extent. You either have to absorb the differentials, or the differences in rates, by selling at a lower price, or you have to give better service and (314) better quality coal. It is a very intricate proposition and it is one that takes a great deal of the time of the coal producers.

(315) I am familiar with the processes of producing coal and the elements of cost that enter into its production. I have also been in constant contact with the sales organization of our company since 1916. I have sold coal myself on a great many occasions. The sales department has advised with me in connection with general matters of sales policy. I prepared the contract forms used by our company in making sales and have discussed the advisability [fol. 387] of making sales, competition, prices and markets.

Appalachian Coals, Inc., is the outgrowth of meetings of bituminous coal operators held in New York City in October, November and December, 1931. As a result of these meetings, a meeting was called at Cincinnati, followed by a series of meetings and committee meetings, resulting in the formation of Appalachian Coals, Inc.

During the latter part of last year there was a great deal of discussion among coal operators and state and national officials with reference to the conditions in the coal industry. (316) Along in the middle of the summer Secretary Lamont and Secretary Doak, of President Hoover's cabinet, had a meeting of operators in Washington, D. C., which I attended. They discussed with coal operators there assembled the necessity of taking some action to improve the coal situation, as a help to the general economic situation and to relieve the condition of unemployment in the country. After considerable discussion it was decided by the Secretaries that there was nothing they could do to assist this situation, except to recommend to the producers that they actively try to work out their own situation. Following this, the Governors of various States discussed the matter with coal producers in their States, and as a result Governor Sampson of Kentucky had two or more meetings with operators of Kentucky and operators from adjoining and competing States.

In October, 1931, Governor Conley of West Virginia called a meeting of operators at Charleston, West Virginia, for the purpose of discussing the situation in the coal industry in West Virginia, and also the advisability of his attending and participating in conferences with the Governors of nine or ten of the important coal producing States east of the Mississippi River, to see if anything could be [fol. 388] worked out within the States to improve conditions in the coal industry as to the producer, the laborer and other people dependent thereon. Operators representing almost half the coal production of West Virginia were present at that meeting. (317) They were from all fields, the Smokeless fields, the northern West Virginia fields, and the southern high volatile fields referred to in this litigation as Appalachian territory.

Governor Conley addressed this meeting at length. The matter was discussed with Governor Conley by the producers present. At the end of the day's discussion the producers said to Governor Conley that they believed the matter was one that should be handled, not by the Governors of States, but by the coal producers themselves. We decided at the meeting, in conference with the Governor—and the Governor agreed with us—that there was nothing the Governors could do to improve the situation. There was discussion of limitation of production in the States by arbitrary agreement, and of the question of the States getting together and agreeing upon uniform legislation to limit production. The producers during the meeting agreed that this was impracticable, and probably illegal under the Federal laws (318).

As a result of that meeting, we recommended to the Governor that the whole matter be submitted to the operators themselves. We suggested to the Governor that we would arrange a conference of the principal producers east of the Mississippi River for the purpose of going into the whole matter to see if something that had not been accomplished to date, could be accomplished to improve the situation in the industry. The Governor was insistent. He said, "Suppose you don't succeed?" We said, "If we cannot arrange such a conference within ten days, we will come back to you and tell you so, and then if you desire to join the other Governors in calling a conference, we will attend such a conference".

[fol. 389] A committee of producers was appointed at that meeting to get in touch with Mr. Bockus, president of the National Coal Association, and ask him to call a general meeting of producers east of the Mississippi River. I was chairman of that committee. I communicated with Mr. Bockus and told him of the conference and told him of the desirability of having such a meeting and asked him if he would arrange it. He said he would confer with a few other members of his executive committee and let me know very shortly. I am a member of the executive committee of the National Coal Association. The reason for the limitation to the region east of the Mississippi River is that 90% of the coal produced and practically 90% of the coal consumed in the United States, is produced and consumed east of the Mississippi River (319). Those figures are not accurate, but that is the general effect. There is a substantial production of coal east of the Mississippi River going west of the Mississippi.

Mr. Bockus did call such a meeting of producers. He invited to it the directors of the National Coal Association residing in the States east of the Mississippi, and requested them to invite producers from their several communities, regardless of whether they were members or non-members of the National Coal Association. Those men were invited, not as directors, but as individual operators. Mr. Bockus said: "This is not a matter that comes properly under the purpose for which the National Coal Association was formed. The National Coal Association is a voluntary association, and I cannot call the directors from a part of the United States, without calling them from other parts too. I will ask them all, and will give them the job of asking a number of people in their districts." As a director I was invited to the meeting. I asked some five or six producers in our particular district to attend the meeting. The meeting was a large one.

[fol. 390] I attended the meeting, which was held October 21, 1931. Mr. Bockus called the meeting to order. He stated that he had called it at the request of this committe; that (320) it was not a meeting of the National Coal Association; that for that reason he did not want to preside, and asked the meeting to elect a chairman. The meeting elected Mr. J. G. Bradley, president of the Elk River Coal & Lumber Company of Dundon, West Virginia, as chair-

man of the meeting. Mr. Bradley made a short statement in regard to the calling of the meeting, and opened up the meeting for general discussion, for any suggestions by anyone present as to what might be done, if anything, to improve the conditions of the bituminous coal industry.

Mr. Bradley's company is not a defendant. His company lies northeast of the territory shown on Defendants' Exhibit 9 as Appalachian territory. His company is not in any of the producing districts making up that territory.

At this meeting the discussion consumed the entire day. A number of plans were suggested, and there was a great deal of discussion about the conditions in the industry, things that have brought the conditions about, including freight rates, general inefficiencies in the burning of coal, competition from all sources, (321) including oil, gas and water power, and the general economic conditions that had created this acute situation in the coal industry. Plans were presented by various people. There was a general discussion. It was a mass meeting, in effect, and after everyone present had presented all the suggestions they desired to present, the chairman stated that to his mind the group was too big to work out anything from the plans recommended. There were about 100 people present. They were not all coal producers. There were some sales agents and some attorneys for coal companies who just dropped in as a matter of interest. There were about 75 producers present.

[fol. 391] (322) A motion was made that a committee be appointed to consider all the suggestions made and to consider any other matters that might be brought before the committee. This motion was adopted and such a committee was appointed. I was a member of the committee. Mr. Mahan of the Southern Coal & Coke Company was chairman of the committee.

The committee met the next day and discussed the various plans that were submitted. Some 15 or 20 operators who were not members of the committee came before it and presented suggestions and ideas that they had not presented the day before and wanted to present to the committee. After a day's discussion, the committee decided that, in addition to counsel for the National Coal Association, Mr. E. L. Greever, who was present at the meeting, it would be well to employ additional counsel who were

not so intimately connected with the industry for advice as to what steps could be taken by the industry legally. A committee from the general committee was appointed, composed of Mr. Michael Gallagher, Cleveland, Ohio, myself, and Mr. Ralph Kanode of the Stonega Coal & Coke Company, a producer in the Virginia district, to call on Colonel Donovan to see if we could obtain his services for the purpose of submitting to him the suggestions and plans the committee might decide upon. This committee saw Colonel Donovan and (323) obtained his services in this capacity. The committee continued the following day and voted that there were two things that would best serve the industry and give it the greatest help in working out its problems.

The reason two propositions were submitted is that groups of operators in some of the districts felt that they could work out the physical consolidations of properties in their districts, and had such plans under consideration; and others felt that, owing to the financial condition of the industry, the difference in capital structure and the desire of the individual producer to remain in charge of his own properties, that would not be practicable in their districts. [fol. 392] Accordingly, two recommendations were made, first, that consideration be given to physical consolidations of properties where practicable and where the operators desired to work them out, second, that in other districts it be recommended to operators that they give consideration to forming regional sales agencies.

I might say that in the general committee meeting action was taken on a number of other matters. A vote of the general meeting was taken asking for Congress to put a tariff on fuel oil. A further vote was taken that it was the consensus of the meeting that freight rates on coal should be reduced and a resolution was passed providing that copies of that resolution be sent to the railway executives of the coal producing areas.

Coal has been losing ground rapidly since 1929, but had been losing its place as a source of light, heat and fuel for a number of years. Coal was losing markets to oil, natural (324) gas and water power, and was also losing ground due to greater efficiency in the use of coal. The

coal industry in 1916 furnished 72% of the total supply of energy from mineral fuels and water power in the United States. In 1919 this had dropped to 64.6%. In 1929 it had dropped to approximately 54%. During the same period, from 1919, natural gas and oil had increased from 17.9% to 32.1% and water power from 4.7% to 7.3%.

Production of coal varies very largely in accordance with the cycles of prosperity or depression in the country. The production of coal in 1929 was comparatively high. 1929 was a comparatively high year, one of the three highest years of actual production. 1918 was the highest year, 1926 the second highest, 1923 the third highest and 1929 the fourth highest year of production in the history of the country, but relatively coal was not increasing.

(325) The percentages which I gave were with relation to the total production of energy from all mineral fuels, [fol. 393] including coal, oil and gas, which are considered mineral fuels, as well as from water power. The production of coal in 1929 was, I believe, slightly in excess of that of 1916. The point there is this. The production of coal in the United States from 1880 to 1915 had practically doubled each decade, and from 1910 to 1915 it was the expectation of the industry that the growth of coal would increase in proportion (326) to the increase in population and as the demands of the country increased, but the growth of coal over the decade from 1920 to 1930 became practically stationary, although the increase in heat, light, power and energy used was in practically the same ratio that it had increased in previous years. But coal did not generally share in that increase.

The lower percentage use of coal to which I referred is not affected by the fact that a large quantity of oil was being used in developing automobile traffic. Gasoline consumption for automobiles is not included. Gasoline is energy producing, but it is not in competition with coal except as the automobile and truck deprive the railroads of the business of transporting commodities, and therefore reduce the demand on the railways. (328) The motive power for automobiles and trucks does not compete with coal for that purpose. The fact that the use of coal did not increase in proportion came about largely by the increased efficiency in the use of coal, and perhaps came about by reason of greater efficiency in the production of coal and

the better cleaning of coal and the greater use of fuel oils, gas and water power. Roughly, the more efficient use of coal due to better cleaning and preparation at the mines and better quality of coal shipped, better efficiency in burning, and the substitution of oil, gas and water power displaced in that period approximately 250,000,000 tons of coal that on the same methods and the same competition as existed prior to the War would probably have been required for the normal consumption of the country.

[fol. 394] The railroads have improved combustion methods and reduced their fuel consumption from 1916 (329) to 1929 by 32,000,000 tons. In freight service, their consumption of coal per thousand freight ton miles dropped from 164 pounds in 1919 to 125 pounds in 1929, and that is continuing to drop. A large system like the Chesapeake & Ohio is today using 88 pounds for that service, as compared to the average for the country in 1919 of 164 pounds. The electrical industry decreased consumption of coal per kilowatt hour from approximately 3.2 pounds to 1.6 pounds, and thereby reduced their requirements for coal in excess of 47,000,000 tons. The statistics are made up from Bureau of Mines figures. The pamphlet I am reading from is a paper I read before the Mineral Section of the American Bar Association at Atlantic City last year and I happened to have those figures in it. These figures were worked out partially by Mr. Evanson and partially by the Bureau of Mines. Efficiency in the smelting of pig iron decreased the consumption of coal, in accordance with the pig iron made, by 10,000,000 tons. The savings in by-product coke manufacture over the beehive system, according to figures Mr. Evanson will present, in greater (330) detail, amounted to 12,000,000 tons.

All these matters were discussed at the meeting in New York. We also discussed in detail the question of the changing demand in the uses for coal and the kind and character thereof. The changes were brought about by the different types of boiler equipment, of locomotives and of heating devices, and the increased use of other fuels. Demand varies with the decrease or increase in business generally. That affects very materially the kind and character of the coal for which there is a demand at a given time. When there is a period of prosperity and the steel industry, for example, is running at anything like capacity, there

is a very heavy demand for coal for coking and for metallurgical purposes. In a period of depression like we are going through at this time and the steel industry is running [fol. 395] at about 15 to 18% capacity, the demand for that kind of coal is reduced to the very minimum. That is true in other industries. And it affects different types of coal to different extents.

(331) The New York meeting in discussing this whole situation felt that the weak place in the coal industry was in the marketing and distribution of coal; that coal was generally mined economically, cleaned and prepared in an efficient manner, but was not well marketed, was not well advertised; and that there was not proper distribution machinery available for the economic and intelligent distribution of coal.

There were numerous evils that the meeting felt should be corrected. The markets in which coal is sold are widely scattered, with a small production, or even a large production of the largest producer; experience has shown that the sales organization to sell coal in competition in all markets was usually, if not always, inadequate. Coal produced, for example, in Appalachian territory is marketed from Florida to Maine along the coast. It is marketed to the Great Lakes and as far west as the Dakotas. The coal producer with a large tonnage usually has offices in a few of the principal consuming centers. Those with a smaller production usually sell through sales agencies that sell for a number of companies and try to (332) concentrate their sales effort more in local territories.

There are a number of such sales agencies, and that has been the history of the industry, that producers have gotten together and sold their coal through agencies. Usually an agency is established by a group of coal salesmen and various mines will employ that agency to sell their coal. That will give the producer with a few hundred thousand tons, or a million tons or more, the opportunity to have his coal offered in more markets than he could reach with the force that he could afford to put on and the money [fol. 396] that he could afford to expend for selling. Now that situation was one that the meeting felt should be corrected. I mean generally that there was a certain duplication of selling effort by producers and sales agents, that the sales effort would be concentrated in certain points and

then certain other markets might be neglected. Take the Cincinnati market as an illustration. (333) That is a city through which a great deal of the coal produced in the southern field passes going north. Most of the companies selling coal north and west of the Ohio River cultivated that market and had salesmen there. In the territory immediately adjacent, with a large enough tonnage, they would have an office probably in Cleveland, Detroit and Chicago. But very few would have an office in Cincinnati or Columbus or Toledo. The men would make occasional visits to these towns and attempt to sell the coal there by salesmen or on the telephone. Then as the towns became smaller, there would be an occasional call. There were a great many salesmen calling on the same trade in the principal centers, and a fewer number in other centers. No company in our region adequately covered, in my opinion, the principal markets in which we sold coal. In a given market they would concentrate in a particular section rather than over the whole area of that market.

By Judge Soper:

Q. Of course it must be true that wherever there are competitors in the sale of goods of any character the same territory must be traveled or worked over by representatives of the various producers. Is there any difference between the duplication to which you refer and that which would (334) exist in any other industry?

A. There is such duplication I think in industry generally. I probably am not competent to speak on the degree of that duplication. The duplication in the coal industry is very great. Now whether it is greater or less than duplication in steel or some other heavy commodities, I [fol. 397] am not competent to speak accurately.

It is not an uncommon thing in our industry for one company to have different selling agencies or jobbers or selling agents selling coal in the same territory. Some producers have no regular sales outlets but offer their product through jobbers or independent sales agencies subject to prior sale, and it is not uncommon for those jobbers or sales agencies to offer the same coal in the same market, (335) the same coal from the same mine. That is not the rule but that is done by producers.

At that meeting we also discussed the question of the dumping of various grades of coal. There are numerous physical situations in the coal industry that are somewhat different from industry in general. Coal at the mine is prepared to be shipped by different operators in from 1 to 5 or 6 grades. Most operators in the Appalachian region are prepared to ship 2 or more grades, and the larger percentage of the tonnage comes from mines that will ship 3 or more grades. A producer selling coal must first sell the grades for which he can find the easiest demand. For example, a mine producing 4 grades of coal, lump, egg, stove and slack, or nut and slack, will have orders for current shipments for the nut and slack and stove sizes. They may have no orders for the egg and lump sizes. There are no storage facilities at mines generally in the coal industry. There are exceptions to that rule. There is a certain amount of coal stored in the State of Illinois. The contour of the land is one of the reasons it cannot be easily stored in our region, the Appalachian region, and the cost and damage to the coal are excessively high and make it unprofitable to try to do storage on any large scale.

When these different sizes of coal are made they are all placed in different railroad cars. The producer ships daily [fol. 398] the sizes for which he has orders. If he does not obtain orders quickly for the grades for which he does not have orders, his tracks below his tipple, which are usually sufficient for about a day or a day and a half supply, in ordinary running time, (336) of railroad cars, are congested. The tipple is the plant in which the coal is cleaned and sized and through which it is loaded into railroad cars. In the case of these sizes for which he has no ready demand, if he accumulates on the tracks he must either stop the production of coal entirely in his mine or find a market for them, or ship them to billing points unsold or on consignment to himself or some agent at a point in the general consuming territory. That is one of the worst practices in the coal industry and it was discussed at length at the New York and Cincinnati meetings.

That is one of the worst practices because when the coal, unsold, leaves the mines, either to a railroad billing point or to a consuming point, if it reaches that point before the shipper has found a buyer for the coal, it is sent out on a side track by the railroad, and there is a charge for setting

it out. The charge is usually $2, but there are different charges at different points for reconsignment. It immediately goes on demurrage. For the first 2 days the demurrage is at the rate of $2 a day. Beginning with the third day the demurrage is at the rate of $5 a day. The Interstate Commerce Commission authorizes those rates of demurrage with the express point in view of keeping shippers from tying up the transportation system by holding commodities and using the railroad's equipment for storage.

(337) The average car of coal is 50 tons. $2 a day is equivalent to 4¢ a ton and $5 a day is equivalent to 10¢ a ton. So it is readily seen that if a shipper has one or a [fol. 399] number of cars of coal at a certain point and it is costing him 10¢ a ton to hold it in railroad cars, the pressure will be to release that coal as quickly as possible; that he will offer it almost regardless of price, because coal selling for a price of 50¢ to $1.50 a ton at the mine for various grades will soon have a demurrage greater than the value of the selling price of the coal. If the shipper cannot dispose of it very quickly, when he does dispose of it, he will not get enough for his coal to pay the demurrage charges, and he will have to add to what he receives, in order to pay the railroad.

Now that coal is considered distress coal. It has a very marked effect upon the price of coal. It gluts the market ahead of normal demand, and at a time when consumers are not readily buying those grades of coal, and low prices are made on that coal in order to induce people who are not really in the market for coal to take that coal and put it in storage because of the very low terms upon which they can buy it.

Coal of that kind may be any size of coal, because the demand for the different sizes varies from period to period and from mine to mine. (338) One mine may have orders for nut and slack coal and another orders for lump and egg. The first named mine may have no orders for lump and egg and the last named mine may have no orders for nut and slack, so that the kinds not under order are not taken care of. Both of them may be happening at exactly the same time, and often does. Sometimes the demand for one size may be down, less than the demand for other sizes.

Distress coal is almost the usual situation under the conditions as we have had them since 1926. It is a rare thing

to find a situation where there are not hundreds of cars of distress coal on the market. One of the evils in the coal industry that at the meetings in New York and Cincinnati it was felt could be corrected was by having a large sales [fol. 400] agency, so that when orders were placed at a mine, they knowing the grades of coal at each mine and the capacity of each mine, orders for each grade would be placed at a mine that would enable that mine to run. And when another mine was receiving orders, that mine would be given orders, for all grades it could furnish (339).

Unless you sell your coal run-of-mine, and undertake to make one grade of coal, you necessarily make the other grades. From the coast to the Appalachian region, the greater percentage of the coals are sold as graded coals, and not as run-of-mine coal. The demand for run-of-mine has decreased year by year and at nearly all mines orders are received for the different sizes, and the individual salesman cannot refuse an order for one size, to wait to be sure that he is going to get an order for another size.

If you prepare that grade for which you have an order, you necessarily make other grades of coal. When the coal comes out of the mine it passes over screens of various sizes. For example, we may have a mine making 4 grades of coal and having 4 screens. Coal that will go through an inch and three-quarters screen will be called nut and slack. Coal that goes over that screen will pass over a screen having holes from one and three-quarters inches to 3 inches, and that will be designated at many mines as stove coal. The coal going over that screen and then going through a 5-inch or 6-inch hole will be called egg coal. Coal going (340) over the 6-inch screen will be called lump coal. Now these sizes can be varied, and are varied, at practically all mines. Lump coal is made in various sizes, from 2 inches to 8 inches. When I speak of making it, I do not mean that you change the size, but it is a process of separation. (341) Coal blasted down in the mine has all these sizes. The blasting down breaks it up. The shoveling and hand-[fol. 401] ling break it up some more, and as it is separated it is made into these grades.

This problem in the coal industry has always existed, but the sizing of coal has increased rapidly in the past 15 or 18 years. 15 or 18 years ago the bulk of the demand for coal was for mine run, but that demand has changed. The

coal industry as a whole was not a profitable one and is an industry that had an over-production prior to the war. Parts of the industry would have a strong market demand during periods of car shortage, and during periods of strikes. Car shortage was one of the factors that created a demand for coal and created a shortage. The shortage artificially created either by strikes or shut-downs in certain districts or by transportation shortages is about the only thing that (342) ever did make a period of prosperity in the coal industry. That is what you would call a seller's market. The longest period of that kind that ever existed was the period beginning in 1916 and extending through to 1923, and from that time there has been a general downward trend in the prices of coal.

We find in the operation of our mines that we produce sizes for which we have no market to such an extent that there is always that problem to be dealt with. We have to refuse certain orders for certain sizes because we cannot produce and make the other sizes. That has been our experience all the time except in periods of demand caused either by car shortages that create a general shortage in the country or caused by shut-downs in the competing fields, due to labor troubles or suspensions of work.

(343) I do not mean that as a result we have always, except at rare intervals, been selling coal for less than it costs us. We have during those periods always sold some coal for less than it costs us. But we have never at our particular mines followed the practice of shipping coal on consignment. When we could not sell we have limited our [fol. 402] production to what we have sold until we could find orders, and we have run less time by doing so. That is the practice of a number of operators, but a great number of operators do not follow that practice and they have set the market for the coal that we do have to sell. They will ship this coal out without having orders in advance, it will be sold as distress coal, and it will have the effect of depressing the market in which we must sell.

The regional sales agency, having the disposition of, and being in a position to obtain orders for, a large volume of coal, would be able at the days they give our mines orders to give us orders for all the grades we would make instead of letting us have orders for parts of the grades one

day and the other mines for the other grades on the same day.

The first periods I am talking about are the normal periods when there is a productive capacity and the production is such that the supply greatly exceeds the demand. That has been the situation in our region since 1924, (344) with the exception of a short period during 1926 that was affected by the anthracite and the British strikes. On the basis of 1929 tonnage, the companies contracting with Appalachian Coals, Inc., had a production of almost 5 million tons per month on the average. They had orders for all grades of coal. All mines were running short time. The general sales agency could so distribute those orders that when a mine did operate it would have orders for all grades, because eventually those grades balance, and the consumption and the demand for those various grades do absorb those grades. But an individual producer with even a very substantial tonnage cannot easily balance those grades. All orders would be distributed by the sales agency to the mines and the sales agency would know the daily capacity of the mine, the kinds of coal it could ship, the grades and sizes [fol. 403] of coal, and it probably would not in itself be able absolutely to hit a balance, but it could greatly improve the situation and prevent a situation arising where coal would be shipped out on the market as distress coal and forced on an unwilling market.

We also discussed the unfair trade practices existing in the industry. They are numerous, both on the part of the producer and on the part of the buyer, the producer offering (345) similar grades to different consumers at different prices, and, on the other hand, the consumer often misrepresenting the market situation and what coal is being offered to him by other producers.

I have in mind an example of the latter kind of representation that has seriously affected this coal region for the past 3 years. Our company usually is the largest shipper in the southern region of coal to the Great Lakes, known as lake cargo coal. That is usually bought in the spring about the time of the opening of the season in navigation. (346) About 30 or 60 days before the opening of navigation, for the past 3 years, a rumor has gone out in the trade that the Island Creek Coal Company was going to make or had made a certain price on lake cargo coal for the coming

season. That rumor was circulated through the trade at a time when we had made no prices on lake cargo coal, when we had discussed no prices or tonnages with any of the people to whom we sell the coal. Those rumors were so current that they went all through the sales organizations of our competitors and through the organizations of all buyers of lake coal. They became common talk in all markets. Denying this kind of rumor availed nothing. The price fixed in the rumor was usually a price that was 15 or 20 cents a ton cheaper than we had sold the coal the previous season. The rumored price was so persistent that other producers, not knowing whether or not the price was really the price, and feeling that they had to meet our competition [fol. 404] to a certain extent in those markets, accepted that price and discussed it. The lake buyers would discuss it and when we came to sell lake cargo coal we found each year that sales were being made and had been made at the price that it was rumored we would sell, and we found it very difficult in any of the past 3 years to get any more for lake coal than the price that had been set by such rumors 60 days in advance of the time we came to sell the coal. That will not be stopped entirely by this organization. Those things will go on, but at least the companies contracting with this organization for the sale of their coal will have definite, reliable information (347) as to what the market is, at least as to the coal sold through this organization, which is a very important matter, a very important factor in the lake market.

(393) There are a great many unfair things done by the producer in order to get orders, and in regard to selling sizes and grades of coal. That is one of the reasons for the growth of grades. People are constantly trying to make new sizes of coal to go into certain types of equipment. Stoker manufacturers are building different types. There is no uniformity in them, and there are producers of coal that will say this kind of coal will be better in that, or that this would do better; and they may sell one size of coal, and often ship another size of coal. That does the coal industry as a whole a greal deal of damage. Lack of standardization of sizes, and misrepresentation as to sizes, has caused a lot of consumers to think that they cannot depend upon the representations made by certain selling agents and certain producer-sellers. We have

felt that more uniformity in sizing of coal would be to the interests of both the producer and the consumer.

We feel like that when a man is buying stove coal, if he knew generally what stove coal meant, what size it was, that he could better judge how it would work in his special [fol. 405] equipment, for his house, or his factory, or his furnace. Now, there may be 10 different sizes of coal sold as stove coal. There may be 6 or 7 sizes of nut coal sold. The same is true as to egg and lump coal. A more uniform sizing of coal would give the consuming public a better knowledge, better information upon which to order their requirements of coal.

(394) Another item that we thought could be improved would be the question of credits and credit losses. Aside from Dun and Bradstreet's, and similar agencies, upon which you can only place a general reliance, we have in the coal industry no comprehensive credit data, as to the ability of consumers, retailers, and wholesalers to pay, their willingness to pay; sales losses amount to a great deal of money, because they will buy coal as long as they can from certain producers, and they switch to other producers, and there is a great big loss to the industry as a result of sales made to irresponsible consumers, and also as to sales made to people who are in failing circumstances. We have felt that an agency with a large production to sell, and large experience, could check up better, could keep more accurate data as to the ability and the willingness to pay and we believe that that would produce a substantial saving in the coal industry.

We as individual producers are unable to do very much on the research and combustion and uses of coal (395).

Natural gas and oil and the people that manufacture oil-burning equipment are advertising to a very large extent the merits and advantages of using oil and natural gas as against any other form of fuel. They tell the benefits to be derived. An individual producer can only afford to go to a limited extent in advertising to offset such advertising.

We believe that coal is the cheapest and most satisfactory source of heat and energy in most cases. But to properly demonstrate that we need combustion engineers, we need in each community men trained to go into the factories and

into the houses of the consumers to show them how they [fol. 406] can burn their coal. Burning of coal can be greatly improved by slight changes in firing, by slight changes in drafts, by slight changes in equipment, and a consumer who is not satisfied with coal can often be retained if proper demonstration is made to him in his plant or in his house as to the best methods of using and burning coal.

One of the things discussed in these meetings both at New York and Cincinnati was the fact that we needed to advertise, to demonstrate and show the consuming public the advantage of burning coal; that with a large tonnage in one or more agencies they could afford the expense of such advertising. We in Appalachian would expect to advertise and demonstrate the especial advantages of the coals from the Appalachian region, also coal as a whole. We would not expect to demonstrate the advantage of Pittsburgh coal or Ohio coal, but we would expect to try to show, and do expect to try to show that Appalachian coal is the best, the cheapest source of heat and power that is available (396).

We considered the economies in sales that might be effected by this organization, not so much in cents per ton, although we felt that economies in cents per ton could eventually be brought about, but that we could effect economies in advertising. Now we all advertise to a certain extent very ineffectively, but if we were advertising a region with the same money that we now spend for advertising we could do a good job, where today we do a poor job.

We spend a certain amount of money individually for combustion engineering. Some individual companies do that and some do not. But we felt that by placing the proper corps of engineers in the general consuming fields that we could economically demonstrate the values of our coals in that community and thus increase the demand for our coals and thereby increase the production of our coals. [fol. 407] We also feel as we go along in this matter that a large number of producers, who really today have no definite sales outlets, would want Appalachian Coals, Inc., to sell their coal directly, with its trained personnel, to take over the sale of a lot of coal that is now just drifting from here to there for sale, and to sell that coal more economically than it is sold today.

We have also felt that a number of companies who are as a matter of necessity maintaining sales distribution outlets of their own would find that they could sell their coal to a greater advantage through Appalachian Coals, Inc., would cease (397) the sale of coal themselves, and allow this agency to handle the sales direct; and as that comes out as a matter of evolution, that we would have more economical sales of our product.

(398) At our Cincinnati meeting a great many operators said: "We do not have any permanent or definite sales organizations. Now will Appalachian Coals, Inc., provide us with an outlet for our coals?" Some of those people came into this organization and some of them did not. There were a great many people in the meeting who did not come in. There are 137 defendant producers, and there are 135 companies producing in this region who are not defendants. We think that probably some of the people who are not defendants may later contract with Appalachian Coals, Inc. Some of them were told that Appalachian Coals, Inc., would provide an outlet for their coal on the same basis as all other producers contract with Appalachian Coals, Inc., and they come in for that reason. (399) Anybody who employs Appalachian Coals, Inc., to sell his coal would be on equal terms with all other companies or individuals employing it to sell their coal.

There was a good deal of discussion about sales agencies. It is hardly fair to say that any one actually suggested the [fol. 408] regional sales agency plan, but I believe the man that probably brought it before the meeting in the strongest form was Mr. John Steinbugler, who is now the president of Atwater & Co., No. 1 Broadway, New York City. They are sellers of low volatile coal from the Pocahontas region. We did not adopt or follow the suggestion that Mr. Steinbugler made at the meeting. It was very greatly modified, but he did take considerable time at the meeting in setting forth the merits of a regional sales agency, probably more forcibly than anybody else.

There was discussion of the existence of sales agencies already operating in the coal industry. Attention was called to the fact that sales agencies had always played an important part in the distribution of coal, for the period of the last 50 years. Attention was called at the meeting to

the fact that for a period of 20 or 25 years a sales agency known as Castner, Curren & Bullitt had sold, in a satisfactory manner, practically the entire output of the Pocahontas coal fields on the Norfolk & Western Railroad beginning about 1882 and continuing until about 1905. That sales company is still selling coal, but has been acquired (400) by the Kopper interests and is used by them to dispose of the output of a number of their mines and it, in addition, buys and sells coal for others. The Kopper Company is a Pittsburgh organization that is engaged in the mining, distribution and sale of coal and in the operation of by-product coak ovens throughout the northeastern part of the United States, as well as in Ohio. It is a Mellon company.

There are other examples of selling agencies, either that existed or are now in existence. For a number of years the Kanawha Fuel Company handled practically the entire output of mines in the Kanawha district, a part of Appalachian territory. There were a large number of other [fol. 409] large agencies that distributed coal from period to period. Today in the Appalachian region there are a number of sales agencies selling the output of more than one company. The Southern Coal & Coke Company is today handling and selling the output of 12 different companies in this region.

The agencies I referred to are exclusive agencies for the output of the mines of the producers contracting with them (401) for the sale of their coal. The agency, with a sales force, would contract with a producing company to sell the output of its mine, or as much of the output as they were able to sell in the competitive markets, and they agree, as a rule, to sell all of the coal of the mine up to what the market will take. As a rule these agreements provide that the agency will use its own judgment on spot sales as to price and quantities sold; that where the sale is to run for a period of more than 60 days, the producer must be notified and his consent obtained as to the quantity to be sold and the price, before the contract is entered into. They are sold independently of the other coal sold by the agency.

I have had two such contracts with a company with which I have been connected and with which I am not now connected—I severed my connection during the present year—Landstreet-Downey Coal Company, a defendant.

This company had a contract with the General Coal Company for the sale of its coal. General Coal Company is a large distributor of coal. It distributes coal from mines of companies that are affiliated with it—it has no mines of its own—and also coal of companies that are not affiliated. This contract ran for a year and provided that General Coal Company was to receive a minimum of 10c a ton for selling the coal. They were to move as much of the coal as they could, as the market would absorb. They were to fix the price on all sales (402) that did not extend over 60 days. If it was a contract for 60 days or longer—which usually [fol. 410] means a contract for a year—they would ask the producing company whether the contract would be satisfactory and whether the company was able to supply the coal. Landstreet-Downey Company had no knowledge as to the prices or quantities of coal the General Coal Company was selling for any other companies represented by it. That is the usual operation of a sales agency.

There was no attempt to allot the coal as between the producers represented. Landstreet-Downey Company did not know whether other mines ran a greater or less percentage of time. They made the contract (403) upon the good faith that they had in the honesty and reliability of the General Coal Company to do the best they could for them, and to give them honest service as compared with the service they would give the other producers contracting with them for the sale of coal. There was no standard of allotment made whatever. The producer relied upon the agency to give them fair treatment . If the agency had three or four coals of a similar character, we in this particular case trusted the agency not to give all the business to other producers they were selling for. We trusted them to treat us fairly. We had a similar contract with the North American Coal Company of Cleveland for a period of two or three years. They might have had some standard unknown to the producers that they served, but we had no method of checking it and we never inquired.

The per cent of the selling price which the 10¢ per ton commission amounted to varied from month to month. The last months of the contract with the North American Company the average return to the mine—and this is a matter of recollection, but it is almost right, I am sure, because I

have had these figures very much in mind—was about 85¢ a ton. The minimum commission paid was 10¢ a ton. The minimum commission was the average (404), because the price of coal was low. The contract, as I remember it, was [fol. 411] that they would get 10¢ a ton on all coal they sold at $2 or less and that for all coal for over $2 they would get 5% of the selling price.

All the general contracts in the industry known to the committee were considered in drafting the form of contract, and the committee had at the New York meeting a number of those agency contracts, and they read them over and considered them, and they adopted parts of various contracts.

The New York meeting decided that it could make no plan for the industry as a whole, but they could only make suggestions. This was discussed, and the result of the discussion was that they voted that this matter should be submitted back to the districts with the recommendation that the districts give this matter consideration and that each district decide for itself whether or not it would follow the recommendation. The New York meeting (405) recommended that the producers generally take some action, physical consolidation, or sales agency, or do whatever they could to improve the situation in the industry.

The reasons why no plan could be imposed upon the entire industry were discussed at the New York meeting. At the New York meeting it was discussed that there was a great difference in the freight rates to the principal competitive markets; that there was a difference in labor conditions; that there was some general hostility between producing districts growing out of the difference in labor conditions and freight rates; that there had been for years, for example, litigation before the Interstate Commerce Commission and in the courts between Appalachian territory and West Virginia-Virginia low volatile regions and the Ohio-Pennsylvania regions; that in the eastern tidewater markets and the eastern all-rail markets there have been series of litigations before the Interstate Commerce Commission as to the measure of rates, and whether or not the southern districts, composing the Appalachian and Smokeless fields, should be allowed to have rates for all-rail haul to the (406) districts north of Washington, D. C. For a

long period of years the Appalachian and southern low [fol. 412] volatile fields had no rates north of Washington. It was only after a long series of meetings and due to the emergency created by the anthracite strike in 1926 that the Interstate Commerce Commission finally granted rates that would allow southern coals to move all-rail on through rates north of Washington. Then these differentials were a minimum of $1.10 a ton for the southern coals to points to Baltimore and north, over the coals coming from Maryland and Pennsylvania.

The competition between these districts had been so keen that it was not felt the districts could work together. There were differences about wages, and there had been a good deal of antagonism between the southern districts and the northern districts about customs of employment and wage rates. The northern districts, north of the Ohio River, to the competing markets north of the Ohio River, north of Washington, D. C., where 75% of the coal from Appalachian coal territory was sold, had such freight advantages that the southern producers felt that they could not work with them, because if they did it would result in the northern districts supplying the markets, and a substantial reduction in the production in the southern districts.

That feeling was not alone there. The Fairmont district had the same feeling as to their competition with Pittsburgh and Ohio. They were in between. Their differentials (407) over Pittsburgh were less than ours, and so they occupied middle ground. But they also had been a party to this long litigation that we have had before the Interstate Commerce Commission involving the rate structure. Western Kentucky had had similar litigation with the producing districts of Illinois and Indiana. It is all a matter of public record and has been a long-standing controversy. (408).

The northern and the southern districts felt that it would [fol. 413] be futile, because of the difference in freight rates and labor, for them to have a common selling agent, who would find difficulty in handling both coals on the same basis when there was a substantial differential in freight rates. There was discussion of freight rate differentials and wages. A number of producers contended that the only basis of working out any plan would be to have a uniform wage scale. Other producers said: "Well, but with the uni-

form wage scale all over the country, (409) the man with the freight rate differentials would get all the business up to his capacity to produce." And as a result of that discussion—and I think before the discussion was had, it was agreed—I do not say by a vote—I do not believe there was any vote on the subject—but it was the sense of the meeting that no attempt should be made by the producers as a whole to work together as a whole. Of course the producers there were not representatives of their districts. They were there as individuals. They did not really represent their companies because the matter had not been submitted to their companies. They were there just as individuals interested in production, distribution and anything that might improve the general situation in the industry.

It was considered whether or not each of the individual districts could agree upon the same plan, and it was pointed out by many that a plan that would suit one region or district would not be satisfactory to another region or district. The plan that was discussed and the plan that was finally recommended as a guide, not as a definite plan but as a guide to what the regions could plan in a legal manner, under advice of counsel, was a plan to be modified and worked out individually by such districts as decided to go forward.

There were some representatives of districts at the meeting who said, (410) "No plan can be worked out in our dis-
[fol. 414] trict." That was particularly true of central Pennsylvania. Practically all the operators from there said: "Really the only thing that ought to be done, the immediate thing that ought to be done, is to reduce freight rates. The railroads ought to reduce freight rates and we ought to get a uniform wage scale. That will enable us to give the consumer coal in better competition with this fuel oil that is flooding the markets along the Atlantic Coast." They further said: "You people in the south have lower wages than we have and you have some advantage there and unless you raise your wages to our level we do not see anything that we can accomplish."

In another large district in western Pennsylvania they said: "We believe we can work out a physical consolidation of properties better than we can work out a sales agency plan. We are not sure of it, but that appears to us as the best thing to do in our district. We do not know. We really

do not believe that we can really adopt a regional sales agency plan that very many people in our district will accept, and will contract with the regional sales agency to sell coal. We have a large number of larger companies."

There was various discussion of that kind in the meeting. The meeting finally unanimously voted to recommend consolidation as one method, the regional sales agency as another. But some of the people (411) voting for it were frankly skeptical as to whether it could be carried out at all in the regions from which they came. It was the sense of the meeting that it would not be practicable to unite under a common selling agent two distinct regions unless the conditions, such as labor and freight rates, were substantially similar so that they could compete on a reasonable basis.

By Judge Parker:

Q. Was it discussed at that meeting to organize more than one selling agency in a particular region? For instance, as I understand in this Appalachian section there, [fol. 415] there are eight distinct regions. Was it discussed to organize more than one selling agency so that there might be competition between the selling agencies organized?

A. It was not discussed at the New York meeting except incidentally. There were eight producing districts having not the same but generally the same freight rates to the same markets. Having generally coal of the same character. The list of districts was made up in accordance with their membership in the National Coal Association or their lack of membership in the National Coal Association, as they were considered from that standpoint. And at the end of the meeting Mr. Bradley, the Chairman of the meeting at New York, appointed committees from each of the districts named in the booklet filed as Exhibit B with the answer. (412) A number of those individuals appointed were at the New York meeting. Some were not.

We were having a meeting on some freight rate matters from these southern districts, and we met in one of the adjacent rooms at the close of the meeting. The discussion came up there: "Shall we meet together as one district or shall we consider this matter from the standpoint of one or more districts?" And the individuals there said:

"Well, let us call our eight producing districts that have been working together, who have similar coals, in one meeting at Cincinnati, discuss the whole problem, put this up and let that meeting decide whether they shall work together as one sales agency or whether they should have two or more."

When I said the districts were working together I meant that since 1900—I think it was in 1920—there was formed at Cincinnati a group known as the Property Owners Committee composed of representatives from the local districts in the eight high volatile and four low volatile districts of [fol. 416] southern West Virginia, for the purpose of offensive and defensive freight rate matters on questions of rates, for the purpose of meeting with our railroad presidents and traffic vice-presidents to bring about a more equitable rate adjustment from our districts to the competing markets. (413).

Ohio had a similar committee. I do not know whether or not the scope of the committee was quite as broad as ours. Pennsylvania had a standing committee to look after freight rate matters.

We discussed the question of local taxes and we discussed similar matters. We discussed power rates. These eight producing districts for which we appointed a committee had worked jointly on other occasions concerning different matters, touching freight rates or taxes or other matters applicable to those districts. We had at times discussed the question of the advisability, in the high volatile districts, of a regional sales agency for the high volatile districts. We had never made any really substantial progress, but we had talked about it.

By Judge Parker:

Q. What is the origin of the eight districts? Is it a current seam, or what determines the boundaries of the districts?

A. We are in a very mountainous country, and as the railroads went up these various valleys and the coal production was developed on the railroad in a particular valley, it became a local district. Right across the hill, they might be mining the same seam of coal, but there were no roads across those mountains, and we were inaccessible to each

other up until the last five or six years, when roads were built locally. (414) While we were, perhaps, only 10 or 15 miles apart, with the mines in one district perhaps actually adjoining the mines in the other districts, to actually go around to the center of the district would require travel of 200 miles or more. So these local producers [fol. 417] formed these local districts for matters of local discretion.

The districts are located in four states, (415) but generally we had the same general problems. The question of a production tax on the production of coal had been discussed actively in Kentucky and West Virginia for years. We have all felt that it would have been a very serious matter, our coal coming in competition with the coal from other States not having a production tax, to have a tax of one or two or three cents a ton placed upon the production from our States, and in our legislatures we have opposed such matters. We have discussed similar matters. We people in West Virginia have discussed it with the people in Kentucky, and told them the arguments we were putting up before our legislatures, as to what could be done, and the disadvantages of these various things.

By Judge Parker:

Q. Why was only one selling agency assigned to a field, and why would it not have been practical, or why would not the same results have been accomplished which you say were desirable, if a selling agency had been assigned to each district, or why would not the same result have been accomplished if two or three selling agencies had been created for each field, which would have produced competition between the various producers, while allowing the (416) other economies to be worked out that you speak of?

A. We felt that we could not, in any of those eight districts, or in any two or three of those eight districts, get enough companies to employ one single agency, to justify the expense of employing the necessary officers, salesmen, and combustion engineers, to carry the expense of the advertising and keep sufficient salesmen in all areas to cultivate properly the markets. We felt that a very substantial volume was necessary to do this work at a reasonable expense, and to do it effectively. Our plan of organization

contemplated that we would employ a president, several vice-presidents, engineers, and inspectors, and that the [fol. 418] larger tonnage we had, the less cost per ton, and the larger tonnage we had, the more general information we would have as to credits, the more markets we could cultivate intensively, and the better able we would be to meet the competition of competing districts.

(417) Q. Was there any competition from competing districts within the territory embraced in the States of West Virginia, Virginia, North and South Carolina, Tennessee and Kentucky.

A. There are practically no competing districts in southern West Virginia, except Smokeless, or in eastern Kentucky except Smokeless, and there are some markets in eastern Kentucky where Smokeless does not reach.

(418) In Tennessee there are no competing districts, except Alabama, West Kentucky, and a small amount of southern Illinois.

In Virginia there is no substantial competing district except Smokeless, and a small part of northern West Virginia in the region of Washington and the northern end, up next to Maryland, where Maryland, northern West Virginia and Pennsylvania coal comes in to an extent.

In North Carolina there are no competing districts reaching this market in here (pointing on map), except the Smokeless district, a small production in the State of North Carolina, and it is very small. There is potential competition from Alabama, but not actual competition.

In South Carolina there is some competition from Smokeless. The Smokeless competition there has declined. In 1913 Smokeless supplied approximately 18 to 20% of the consumption in South Carolina. In 1929 that had dropped to 4%. Alabama reaches South Carolina to some extent.

The Georgia situation is Appalachian territory, central [fol. 419] Tennessee, western Kentucky, and Alabama.

We never hoped or expected that we would get more than 75 or 80% of the production in Appalachian territory to employ this agency to sell their coal. We passed a resolution at one of the meetings, and the resolution of course will be subject to change, but it was the sense of the meeting that if — got 70% to agree to employ the sales agency, Appalachian Coals, Inc., it would be enough to carry the expense and do an effective job; that we should not go

over 80% (419). We worked pretty hard to get all the tonnage we could to employ this agency. We succeeded in getting approximately 73%.

That 27% that is out produced 27% of the tonnage in Appalachian territory in 1929, but those mines had an excess capacity that would enable them to produce a very materially greater tonnage, and in counting the tonnage we did not count the tonnage of the captive mines at all.

We did not eliminate that tonnage entirely, because it was non-competitive. Some captive mines do not sell in the competitive markets. A captive mine is a mine that is owned by a company consuming a part or all of its output, such as steel companies and railroad companies, and by-product companies, like the Koppers Company. They own a number of mines, and have a substantial production in this region. The Ford Motor Company has a very substantial production. Both of these companies sell commercial coal, but we eliminated them, because we knew that with their own consumption there was little probability of their employing Appalachian Coals, Inc., as exclusive sales agents for their coal. But they have a very substantial production of coal, and Mr. McGarry has testified that the mines of the companies, including the captive mines in this territory that do not employ Appalachian Coals, Inc., as a sales agency, have a productive (420) capacity [fol. 420] in excess of 82,000,000 tons, the total production of the region in 1929 being 107,000,000 tons, and that includes a scattered production outside of the counties in which we have companies employing Appalachian Coals, Inc., as sales agents.

By Judge Parker:

Q. Was that productive capacity of 82,000,000 tons the productive capacity of the mines of high cost production, or the productive capacity at about the same cost of production as the other mines?

A. As a mine increases its production, the cost rapidly declines. A mine that can run 6 days a week can produce coal at a substantially lower amount than the mine that can produce coal running only 3 days a week.

Q. I understand that, but I had assumed this: that if I were running 6 mines, and had to close 3 of them, I would close the 3 that cost me the most to operate.

A. Our Company, the Island Creek Coal Company, has 16 mines that we consider normally active mines. We are now operating only 5 of those mines. The other mines are just as good mines, but we cannot find a market for the coal of the other 11 mines, and as a matter of fact we are not averaging 3 days a week at the 5 mines that we are operating. But the other mines are just as good mines, just as efficient mines, and we could bring those mines back into operation under present conditions to full capacity within a period of two or three weeks. But it is just because we do not have the market for the coal.

(421) By Judge Soper:

Q. What is the explanation that about 50% of the capacity is producing three times as much coal as the other 50%? There must be some distinction between those mines. What I had in mind was this: Roughly speaking, 75% is [fol. 421] in the association, and roughly speaking, it is about 50% of the capacity, or a little over. Then the other 50% is only producing 25% of the coal.

A. No, that is not correct. That 75%, or to be more accurate, 73%, and the other 27%, are the mines that we ourselves designated as mines other than captive. But that 82,000,000 tons includes that 27%, plus the capacity of the captive mines.

Q. Well, what is the capacity of the 27%?

A. I have the capacity divided between the captive and non-captive mines that are non-defendants. I have the production for 1929, the year we are referring to generally, of the non-defendant companies, captive and non-captive. (422) The production of the non-defendant mines other than captive—mines actually operating, not mines closed down because of lack of market—in 1929 was 19,969,575 tons. The production of the mines we designated as captive was 16,453,001 tons.

In addition to those mines which are located immediately in the 24 counties in the 8 local districts comprising Appalachian territory, there is a surrounding production of approximately 12,000,000 tons that has approximately the same freight rates and sells coal in approximately the same markets. And Mr. McGarry's figures of 82,000,000 tons capacity was the capacity of those companies and mines who are not contracting with Appalachian Coals.

The figures I gave represent what might be called the production of the independents, including captive mines and all the mines in adjacent counties. That comes up to about 48,000,000 tons and the capacity was about 86,000,000 tons. (423) I did not have that figure until Mr. McGarry gave it here.

The 1929 production of the defendant companies was 58,011,367 tons. No captive mines are included because no captive mines have employed Appalachian Coals, Inc., to sell their coal. The capacity of those mines, as testified to by Mr. McGarry, was 86,600,000 tons plus.

[fol. 422] By Judge Parker:

Q. Now if I understand you, you recognized that you could not either monopolize or unreasonably restrain competition even within the territory embraced by southern West Virginia, western Virginia, Piedmont, and North and South Carolina and eastern Kentucky and Tennessee.

A. We did.

Q. But you thought that the competition from the low volatile or Smokeless field and the competition from the producers of the high volatile field who would not enter the selling agency would be sufficient competition to relieve the plan upon which you had agreed of any criticism of the violation (424) of the law, is that your position about the matter?

A. We did. And that was discussed for hours to see what the commercial situation was, and what coal could be offered in each consuming market.

Q. Now that brings the question down to the efficiency of the competition from these two factors, the independents within the field, and the competition from the Smokeless or low volatile field.

A. Yes. That is, as to the southern territory and as to the local markets.

Q. Yes, that is what I am speaking about. I am not considering the northern field. A different question arises there, that is competition between this selling agency and other selling agencies. But I am speaking now of the competition within this particular field, south of the Ohio river. Now this question arises in my mind: To what extent would this selling agency have it in its power to control prices?

A. I do not think it would have in its power to exercise

control of prices. I think at every point the prices made by this selling agency will be based upon the competition [fol. 423] and tonnage offered by competitors within the Appalachian territory and in the Smokeless fields and in the Alabama fields. I do not think it will be within its power to fix prices in (425) any market.

Q. Well, I am wondering this, if a selling agency controls 73% of the actual production and exceeding 50% of the possible production in the field, would not the price which that agency placed upon coal be followed by other producers, and if not, why not?

A. It does not control 73% of the production. It does of the production other than the captive mines. You have 58,000,000 tons of production of companies employing the agency compared roughly with 48,000,000 tons of production of companies not employing the agency. That would be the comparison as between the companies contracting and the companies not contracting. Then we have, too, a great part of the Smokeless fields which had a production of 56,000,000 tons in 1929, and according to Mr. McGarry's testimony a productive capacity of 75,900,000 tons. We have, in addition, to Georgia and parts of South Carolina and Tennessee, the Alabama competition, with a productive capacity of from 24,000,000 to 25,000,000 tons.

(426) There are a number of reasons why the prices which Appalachian Coals, Inc., placed upon its coal would not be followed by other producers. In the first place, it is not the purpose or plan of the agency to make and maintain a fixed price. If they did, these other competitors in the Appalachian area, in order to gain running time, would increase their production, under-sell and take the markets. A number of producers said they felt they would be better off to do that, that they felt that by running full time, under-selling, they would be better off and make more money.

Now there is another phase. Appalachian coals won't all be sold at the same price even for the same size of coal. We have numerous grades of coal to sell in the market, and a coal that is sold for steam purposes from this region, [fol. 424] that will be sold by this agency, that has 5% ash and less than 1% sulphur, naturally would and should bring and does bring in the market a better price than a steam coal that could be used in the same boilers, that has 8%

ash or 10% ash and one and a half or 2% sulphur. So this agency for steam purposes, for domestic purposes, for by-product purposes will be offering (427) to customers different qualities of coal of the same sizes at different prices. The customer will have his choice as to which coal he will take, price considered, through this agency. A by-product plant may say, "I would like to have a coal running 4% in ash and one-half % sulphur, but if I have to pay 5¢ more per ton I would rather take a 5% ash coal and a three-quarter % sulphur." And there will be as between the coals sold by this agency a competition there based upon value in accordance with the use to which it is put (428).

That will create a competition between the coals sold by this agency, and it was recognized that there would be times when there would be a greater demand for coals of one quality, or suitable for one purpose, than at other times, and that that would vary from time to time, and that mines where the demand was greater for their quality of coal would run to a greater extent than mines having a coal for which there was a less demand. That would have to be worked out day by day and week by week by the officers and employees of the selling agency; but there would be substantial competition, really, between the coals offered by the agency, depending upon the character and the use and the quality of the coals. The coals in that field run from 3% ash to 16% ash. Those coals can be used for making steam. They can be used for household use, and it is a question of comparative value in price. Then there is another element entering into it that will always affect it. The price in the southern districts has always borne a certain relationship to the price fixed in the central competitive markets north and west of the Ohio River. It is not absolute. It could be changed, but it is a fact that the coals in the south have generally moved in rela-
[fol. 425] tionship to the prices fixed in the big markets. The big market fixes, in the mind of the producer, about what he ought to get for his coal, and then, when he comes into the lesser market, that is the price he has in mind generally for his product.

By Judge Parker:

Q. Your thought is, then, that the price would be fixed by competition between these selling agencies in the central

competitive field, and that the local prices will follow that?

(429) A. That would be one element of fixing or establishing the price. It might not be the controlling element.

Q. What do you think would control?

A. The controlling element is going to be the competition between the non-defendant companies, the Smokeless coals, and the Alabama coals, and the competition between the coals sold by the agency in accordance with what the customer wants.

Q. You mean the controlling element in fixing the price in the limited field I spoke about.

A. Yes; in the limited field you are speaking of. I am speaking entirely now of the territory south of the Ohio River, and south of the District of Columbia.

There will, of necessity, be competition internally in the agency itself, because the coals vary in quality.

By Judge Soper:

Q. May we safely conclude from your testimony that it was neither the purpose nor the expectation of the parties who entered into this sales agency that there would be no effect in raising prices?

A. No, you cannot. The producers employing this agency hoped that they could, in normal conditions, by eliminating some of the abuses and evils that I have described, by better advertising and better demonstration of the use of the coals, get more in the aggregate for their coal, but they did not expect to be able, in any arbitrary way, by naming a price, to go out and (430) sell and get that price.

[fol. 426] Q. Except for the matter of distress coal, which we may lay aside for the moment, could not practically all of the advantages that you have described, including advertising, research, and exchange of credit information, have been secured through the agencies that you already had as, for instance, the National Coal Association, or, if you wanted one of a more limited scope, by an association which would have rendered these services at a certain price to each member, without giving the Association the right to fix prices for the coal?

A. No, I think not. In discussion of matters of this kind, it is my opinion that the only way that a large number of scattered producers can effectively work together

and understand each other, and not have misunderstandings as to what they are doing, is by working under a definite, fixed, written obligation. (431) My experience is that when a man tries, or when men meet and try to work out some of their problems, that they may misunderstand each other, or that they do not live up to the obligations that are made as association propositions.

And then there is another point: that producers competing with each other, who have just a limited common interest, hesitate to give up the information they have about their own business, about their own credits, about their own customers. They are very jealous of that. And there are other substantial things that this agency can work out, I mean other than those that you have enumerated, and other than the dumping of coal.

We have tried in the Smokeless fields to establish some standard of sizes. We thought it would be to the benefit of the producer and the consumer. And for six or eight months it looked like it was going to work. People said, "Well, that is a good thing." Consumer organizations said, "That would be highly satisfactory." But it did not work. In actual practice and operation, we soon found that a large number of companies were sticking to the old [fol. 427] sizes for coal, and were really making new sizes. The human factor was such that it just would not work out.

Q. If you have a concern that is selling as a unit 50% of the capacity in a certain competitive district, that selling organization is bound to come to some conclusion as to what it ought to get for its goods, is it not?

A. That is true.

Q. And it is going to name a price, just like you mentioned a while ago, when you consider what you are going to do (432) with your lake cargo customers, as to which you come to some conclusion as to what you are going to do. And sooner or later that information gets out, and it will get out, with this 50% of production. Do you take the position that the other independent producers, who altogether, hundreds of them, produce the other 50%, won't be sitting on the side lines waiting to find out what the big companies are going to do before they name their price?

A. I think that will occur in cases, unquestionably.

Q. But you don't think it will have any effect whatever, that element considered by itself, to raise prices?

A. It might have a tendency in that direction, but just how far it will go, I do not know.

By Judge Parker:

Q. If you raise that to a point too high above the cost of production, then the little fellows will come in and underbid them and take the business away from them, will they not?

A. Yes, that is exactly what we have in mind. And in our meetings, we particularly stressed the fact that it would not be the purpose of this organization to hold an umbrella, as you might term it, over the competitors in the Appalachian territory who do not employ this agency, or any competing districts; (433) that we would not fix a price or name a price on a grade of coal that would give the other producers an opportunity to take our markets.

I know that there are very substantial units in the steel [fol. 428] industry and other industries, but as to their percentage control, I do not know the actual percentages.

It was not the intent to have Appalachian Coals, Inc., fix the market price. We do not think that it could fix or establish the market price. The fact that this sales agency had a large tonnage, that it controlled the price at which it offered the coal in competition in the markets, would mean that there were fewer individual companies offering coal, and that would unquestionably lessen the number of people offering coal. But we did not feel that it would lessen it so materially as to give it the power to fix the price in the competitive markets. (434) As I answered a question from Judge Parker, the primary price is fixed in the general market in competition with these other districts and the outside producers.

In South Carolina, North Carolina and the southern States, there is competition with oil, hydroelectric energy, and there is competition even with wood for domestic and, to some extent, industrial uses. In a market like South Carolina, there is very substantial competition for the fuel supply. Mr. Tryon testified from the Census in 1929 as to statistics on manufacturing industries. The statistics show that in South Carolina in that year the quantity and value of fuels used in manufacturing industry was $12,-

358,500, of which bituminous coal represented $3,220,098, or 26.05% of the total. I am reading from a publication of the Bureau of Census, 15th Census of the United States, Manufactures in 1929, (436) and the figures above quoted are taken from page 12.

(464) By Judge Soper:

Q. About that 12,000,000 tons from the surrounding (465) territory, I should like to have you show us on the map (Defendants' Exhibit 9) where that surrounding territory is located with reference to Appalachian territory.

A. That is the dark territory just north and west of the [fol. 429] Appalachian territory shown on the map, and the dark territory that comes within the circle just on the southeast side. Now, this territory shown here in red is not all territory from which coal is actually being mined. It just shows the general territory. There are hatched cross lines on that map that show the producing areas, just on the edges, and just on both sides there is coal produced, and farther down in Tennessee in the neighborhood of Knoxville and Chattanooga there is coal produced in that region by producers who are not contracting with Appalachian Coals, Inc. And it is these scattered producers that make up the additional tonnage.

They were not included in the Appalachian territory because they did not desire to come in. They were all invited to the meetings, and it just so happened that there were scattering people, people down in Tennessee, around Chattanooga and (466) Knoxville, who thought that they had some advantage in the local markets there, and that they would be a little better off by not coming in. And over on the Virginia side, between the Virginia district and the Smokeless district, there were some coal producers whose volatile matter was slightly lower than the volatile matter in the high volatile districts, and they thought that they would have a little advantage in the markets, and that if they came in they might lose that advantage. So they stayed out.

And over on the K. & M. Railroad, and the Kanawha River, some of those producers that had river facilities and could ship coal down the Ohio by river, they stayed out because they said: "We have a little competitive advantage and we had better keep the advantage we have."

The New York meeting, after this regional plan had been approved, passed a few resolutions in favor of tariffs on imported fuel oil, and appointed committees to explain what had been discussed, legal opinions that had been ob- [fol. 430] tained, to the various districts, and then adjourned (467).

Because we were there in this meeting it was a convenient time for our group in the southern Appalachian region to have the meeting of our Property Owners' Committee on the question of some transportation matters. We called a meeting on transportation matters upon the adjournment of the larger meeting. At that meeting we discussed the regional plan. We had the individuals who were appointed by Mr. Bradley from the various high volatile districts of Appalachian territory. The only discussion we had was whether we would go back home and have meetings in our local districts and appoint some committees, as was outlined in the suggestion of the meeting there, or whether we would take the matter into our own hands and call a general meeting of the producers from that territory. We decided we would call a general meeting of the producers of the territory and tell them all about it at one time. We fixed the place of meeting at Cincinnati. We sent out notices. All producers in each district were asked to attend the meeting in Cincinnati (468).

The meeting was held the 10th and 11th of December, 1931. It was widely advertised. A very large group from all those districts attended the meeting. I estimate there were 200 or 300 people present, coal operators, coal sales agents, owners of coal mines, local bankers from the coal fields, some bankers from Cincinnati, several attorneys who represented coal companies who were interested in the matter.

That meeting elected a chairman, Mr. C. C. Dickinson, and Mr. Greever, who was at the New York meeting, one of the counsel for the National Coal Association, had been asked to attend the meeting. I will say that one of our reasons for having the meetings all together was to avail ourselves of Mr. Greever's services at one meeting at the same price (469).

The meeting was called to order. The chairman of the meeting asked me to make a short statement in regard to [fol. 431] the New York meeting, which I made. They

called upon Mr. Greever to explain a suggested plan contained in the booklet filed with the answer as Exhibit B. Mr. Greever did this at considerable length. There were numerous questions asked from the floor for a period of several hours. Mr. Greever undertook to answer some of those questions, and the Chairman called on me to answer a great many of the questions.

As the result of that discussion at the meeting there was a resolution passed by the group of individuals there present. Again this was a group of individuals. Most of them stated that they had come there without the authority of their board of directors or stockholders; they had come to find out; they had come to inform themselves; whatever they said they were saying without any authority to bind their companies; they were very careful to leave a loophole that they did not want to commit themselves. And with that understanding the following resolution was passed, if I may read it:

That the meeting approve in tentative form a regional organization covering the districts here represented along the lines suggested in the printed pamphlet embodying the report and accompanying documents adopted at the general conference held in New York City on December 3. That upon adjournment of this meeting each district association here represented shall hold a meeting and name a committee of three, and that the committees so named shall meet in joint session (470) tomorrow for the purpose of studying the plan and whipping into shape something that in their opinion will appeal to the districts represented, and that the joint committee shall name a date for another general meeting, to be held in Cincinnati, to discuss and ratify, if so desired, the action taken by the district committees.

That resolution was followed out, committees were appointed, and met the following day, and read over the pamphlet referred to as Exhibit B, filed with the answer, paragraph by paragraph, discussed it, made changes, discussed many of the practical matters that might enter into such an arrangement, and arranged to have the corrected [fol. 432] contracts—the modified contracts, differing from the ones in the printed pamphlet, mimeographed and sent out to all the producers so they could study them and talk

them over with their own companies. That meeting started at 9 o'clock in the morning and adjourned about 7:30 in the evening, so it was quite a long meeting. But that is the substance of what was done.

That meeting was on December 11th. The larger meeting adjourned on the 10th. The larger meeting instructed the committee (471) appointed, after they were through with the work, to set a date for a further meeting, and to notify all the operators. That date was set as December 30, 1931, but the committee agreed to meet again on the 29th of December so that they could make any further suggestions that had been made in the interim by various producers. The committeee met on the 29th, spent another full day, modified their suggestions further and reported to the general committee on December 30th.

That was a meeting very much like the first meeting. There was again a large group of persons in attendance—some 250 or 300. It was an open meeting in the Sinton Hotel. People came and went as they desired, and at that meeting there was a resolution adopted that the regional sales plan as presented to the meeting be approved. (472) In order to make progress and decide whether or not a sufficient number of companies were interested in the regional sales organization, it would be necessary to obtain a charter for a regional sales agency and prepare contracts to be submitted to the individual producers. A committee was appointed to prepare and secure a charter for Appalachian Coals, Incorporated, the name being selected and approved.

At that meeting, quite a number of individuals present said, "We need information to take back to our companies, our stockholders, our directors, to see whether or not they [fol. 433] want to employ this agency that we are discussing as a sales agency. We need something in writing, something to show what it is planned to do." A committee was appointed with instructions to prepare a statement outlining the purposes of Appalachian Coals, Inc., how it had been brought about, what was expected, and what was hoped to be done.

I was a member of the committee. It was also suggested that there be put in this pamphlet a copy of the proposed contract between the producer and Appalachian Coals, Inc.; also a copy of a sub-agent's contract that could be

used between Appalachian Coals, Inc., and any sub-agents that might be appointed by it or designated by producers.

That pamphlet is filed with the answer as Exhibit A (473).

The charter of Appalachian Coals, Inc., was obtained and the company was authorized to do business.

With reference to the question what the economic and competitive conditions were at the time of the organization of Appalachian Coals, Inc., it is necessary to give a few tonnage statistics to show the trend in the industry.

The production of coal in 1880, taking that as an arbitrary starting date, according to figures put out by the Bureau of Mines—all these are Bureau of Mines' figures—was 43,191,758 tons. In 1890 this had increased to 111,000,000—odd tons. In 1900, it had increased to slightly over 212,000,000 tons. In 1910, to slightly over 417,000,000 tons. In 1918, the War year, it had increased to slightly over 579,000,000 tons. That is the peak production for bituminous coal. In 1920, the production dropped to 568,000,000.

From 1921 to 1931, inclusive, the annual figures are as follows; in millions: 1921, 415,000,000 tons; 1922, 422,000,000 tons; 1923, 564,000,000 tons; 1924, 483,000,000 tons; 1925, 520,000,000 tons; 1926, 573,000,000 tons; 1927, 517,000,000 tons; 1928, 500,000,000 tons; 1929, 534,000,000 tons; (474) 1930, 467,000,000 tons; 1931, 378,000,000 tons; [fol. 434] the first six months of 1932, according to estimated reports of the Bureau of Mines, 145,000,000 tons.

As the figures indicate, the growth had been very rapid. Rule-of-thumb operators had said coal production and demand doubles every ten years, and it was rather generally thought in the industry that that would continue for a long time. Up to 1915, coal was cheap, freight rates were low, and the user of coal could afford to use it without giving to- much thought to the efficiency of it. In 1916 as a result of the demand brought on by the World War and car shortages on the railroads, the price of coal advanced and continued to advance. Railroad rates also advanced. Both continued to advance during the war period. Railroad rates advanced after the war period, and coal also.

The demand for coal was very keen in 1917, and in the fall of 1917, August, 1917, President Wilson appointed a Fuel Administrator, under the authority of Congress, as an

emergency measure. The duties of that Fuel Administrator were to see to the distribution of coal, to see that the essential war industries were first served; to see that the coal went to (475) the proper markets, and to fix the maximum prices at which coal could be sold. That control continued until 1920, I believe in March.

Immediately following the Armistice, there was a drop in general business. There was a large surplus storage stock of coal in the hands of consumers. The price of coal dropped, and the production dropped, and the demand dropped. That continued during the year. There was a revival in business the following year, 1920. In that year, the production increased, and the prices increased. Numerous things happened in 1920. There was a general shortage of transportation; there were labor troubles in a number of districts. The price of coal advanced to very high prices. The consumers, fearing shortages, bid up the price of coal very high.

[fol. 435] 1920 was a year of very high production. (476) Stocks on hand at the end of that year were 45,000,000 tons. That was an increase over the beginning of the year of approximately 22,000,000 tons. The consumers in their desire to get coal had increased their stocks largely.

The principal factors entering into the delivered cost of coal to the consumers are, the cost of the coal at the mines, the railroad transportation rates, and the cost of delivery at destination. The cost of delivery at destination affects the retail and small consumer more than it does the large consumer, who gets his coal at the plant in carload lots.

Wages had advanced from 1914 to 1920 at a rapid rate. (477) The last general advance in wages occurred in the fall of 1920, the raising of the base wage rate in the union field 264% above the rate in effect in 1914. Now, I mention the union scale, because that is the only public record scale we can refer to. The advance in the non-union fields was in the same proportion, and at our own mines the advance was slightly greater, our mines being in the non-union field. During that same period there was a very material advance in freight rates. Freight rates did not quite double, but at some points they were doubled, and the average increase was about 70%, or approximately 70%.

There was a tremendous increase in the cost of supplies and machinery used at mines. And it was in line, I imagine,

with the general advance of commodity prices. There was also an increase in the cost of power in 1921 (478).

In 1922 roughly, the consumer of coal was paying almost three times as much for his coal as he was before the war at the mine. He was paying almost double the transportation charges. His fuel bill was becoming a serious part of his cost, whether he was a householder, a manufacturer, or a railroad. I might say that industrial companies and railroads and people that were in a position to do so, that [fol. 436] consumed enough coal to justify it, employed efficiency engineers to show them how to make their coal go farther, to burn it more efficiently, install more modern equipment. It is the usual result of high prices of any commodity, inventive genius was called into play. There was, as a result, a general increase in the efficiency in the use of coal. That did not stop with the high prices. That is continuing today, all during that period, from that time on down. That effort has continued, and is still continuing, because while prices of coal have gone back today to substantially the pre-war basis, railroad freight rates have gone down very slightly, and that is a large element in the delivered price of coal.

(479) In the first part of 1923, the railroads were not able to transport to market the coal offered to them. But by the fall of 1923 the railroads of the country had put themselves in position where they were able to transport all commodities freely. There was no shortage of cars, or transportation supply, after the fall of 1923, and there has been none since. The transportation supply has always been of the most vital importance to the coal-producing and consuming public, and up until that period was one, if not the chief factor, of variation in the price of coal.

This new development in the matter of transportation had a very marked effect on competition in the coal market. It brought into active competition in the markets the excess productive capacity at the mines. For example, the production on the Chesapeake and Ohio Railroad had never exceeded approximately 30,000,000 tons per annum up until that period. But it increased within a period of two years to 50,000,000 tons. Producers in that region for the first time found themselves in position, if they could market their coal, to have a transportation supply that would move to market all the coal they could produce.

[fol. 437] During the post-war period, the demand for coal was keen with the exception of the year immediately following the war, when we had a drop, and then the depression in 1921. (480) It as a period, excepting the short depression in 1919, and the short depression in 1921, or you can say that from 1916 to the fall of 1923, there was a sellers' market in coal. The question was not a question of being able to sell, but of being able to produce what could be sold.

That varied in intensity during that period. A coal operator generally was more interested in whether he could get transportation to the market, and quick deliveries were of the utmost importance to the consumer, or the consumers thought it was. The producer of coal did not have to do very much to sell his product at a price generally that would return him a profit, and generally producers of coal become somewhat lax in their sales efforts. And there grew up a large number of jobbers and wholesalers and middle-men, who would buy coal for resale for a quick turn.

In 1920 spot prices of coal went as high as $20 a ton, for a period of a few weeks. There was almost a panic of buyers. They feared a shortage. They accumulated excess storage. And a jobber or a wholesaler who could buy from the mines cars of coal and be able to say to the consumer, "I have so many cars of coal on tracts, and it is in transit, and I can deliver it to you in 3 days, or in 5 days, or in some definite period," could make a very substantial profit. Sometimes those profits ran into hundreds of dollars per car. They were selling transportation, almost, instead of (481) coal, because car numbers were given, and some operators, many operators, fixed a limit upon the price they would charge for coal.

They would not sell coal for more than a stated price. They saw, or thought they saw, that it was a dangerous thing to do. Some of them were afraid of prosecution under the Lever Act for selling at excessixely high prices. [fol. 438] Others were afraid that it was going to have a disastrous effect on their customers, that it would be considered taking unfair advantage of them, and they decided to hold their prices of coal to more reasonable limits. And so those cars of coal in that competitive market, that could be sold at those high prices for quick delivery, created one

of the easiest ways to make money out of the coal business that was ever seen. And it was a situation that would naturally create middle-men and brokers and wholesalers. People would go into it without any investment at all, just their ability to get producers to sell them a certain amount of coal at a certain price. And that resulted in a great increase in the distributors of coal. (482)

There was a material increase in the productive capacity during the war and immediately following the war. The Fuel Administrator encouraged the development of mines and gave priority orders for movement of materials to mines. Railroads were asked by the Fuel Administrator to put in side tracks and prepare for additional mines. The number of mines and the capacity of the mines increased materially during that period. During that immediate period it was not so much a question of preparation, but that came after the war, and it had come in a number of the districts very much before the war.

The coal industry first started with coal being shipped as mine run coal without screening. The history of the coal industry is that in mines if there was demand for coarser grades of coal, that coal miners would use forks instead of shovels to put the coal in the cars, leaving the fine size in the mines. For a number of years in certain districts the miners were paid—after screens were installed on tipples to separate the coal into grades and sizes, the miners were paid on the basis of the amount of screened coal made at the tipple. By screened coal I mean coal that was passed over a tipple where the (483) small sizes went through one screen, the slack or the nut and slack, and the larger sizes [fol. 439] went over another screen and in separate railroad cars.

Slack, or nut and slack, usually nut and slack, is the smallest. In those cases in the first screens it was usually an inch and a half or an inch and three-quarters screen through which the slack or nut and slack dropped, and the coal going over it was an inch and a half or inch and three-quarters lump. And that continued in the state of Ohio until 1913-1914. There was a strike in Ohio in 1913 and 1914 lasting about sixteen months, as the result of the miners demanding that they be paid for all the coal they mined, instead of just the lump coal, and finally the legislature of

that state passed a law requiring that all the coal be paid for.

The number of sizes and the types of sizes increased as time went along. When I first went in to coal business railroads bought nothing but mine-run coal, that is, coal that is loaded in the mine, brought out, lumps of all sizes, and the slack of all sizes—everything that is blasted down and brought out and loaded over the tipple was mine-run coal. Now sizes have increased. (484) First there were two sizes, and they increased year by year until I think our own company is making some fifteen or sixteen sizes of coal, different sizes.

Each size has a different name or is—not exactly a different name—a different designation. Lump coal may be two inch, may be three inch lump coal, it may be four inch, it may be six inch. Egg coal will vary in size. And nut coal will vary in size. And stove coal will vary in size. Pea coal will vary in size. There is no standard. One man will offer a consumer pea coal that may be half the size of what the other man offers him. And there is no standardization of sizes. Now that system of sizing of coal has had an important effect in the market. It has increased rapidly during the past few years, and in the state of Ohio [fol. 440] and in western Pennsylvania has increased very rapidly since 1924. The southern fields, Smokeless and high Volatile in this Appalachian region, were among the pioneers in sizing and screening coal.

Beginning around 1900 the consumers of coal began to watch their consumption to some degree. And the coal would be more efficient. It developed very slowly. The coal producer that was situated as these southern fields (485) are for their principal markets, where they had to go into the consuming markets on a freight rate disadvantage, brought it partially, in order to convince the consumer that they were offering a superior product. Another great advantage in screening and sizing coal is that when coal is prepared and shipped as mine run over the old-fashioned tipple it comes out thick, it is hard to see the rock and the slate and the sulphur balls that are in the coal. By first screening it and then separating it on what is known as picking tables it is easier to see the visible impurities and to take them out. And it makes a much better

grade of coal. Coal coming out of the mine on the tipple that had 9% ash, by careful picking on the table, might be reduced to 6% ash. (486)

A mine that could offer lower ash and lower sulphur coal, due to this extra preparation, was in a better position to sell in the competitive markets, and as one company did it and started in the market, another one saw the advantages of doing it, until it is practically universal in the southern fields, so far as tonnage is concerned, and is rapidly becoming universal in the northern fields. As Mr. Booth testified, his own company did not go into the modern methods extensively until after 1924. Then, in order to put themselves in a position to meet the competition of the Southern fields, they spent $18,000,000, as he testified here, to improve their facilities to clean their coal to take out the impurities. That preparation of coal in the Southern [fol. 441] fields is one of the principal things that helped the Southern coals to establish themselves in the markets to the extent that they are today.

Similar progress has not been made in the methods of distribution. Producers of coal are largely engineers or men that grew up in the production department, and are men that had little or no training in sales and distribution. Some producers established their own sources, and employed salesmen of experience to sell their coal. Others employed sales agencies, and some progress was made along that line, as described by Mr. Booth, when they had 90% of the production in the Pittsburgh district. But when the coal industry found itself with a buyer's demand for a period of eight years, (487) and in some districts nine or ten years; they did not know, or feel the necessity of setting up adequate sales organizations or outlets. They did not give it the time and attention they have the other phases of their business.

As a producer of coal, we worked very hard to save a quarter of a cent or half a cent in the cost of production at the mines. A difference of a cent in the cost of production at the ordinary mine, under ordinary running conditions, is a very good feat for the management to bring about in a short period, aside from the question of wage reductions. In the sale of coal, there is no such intensive effort.

I would say that the effort, on the contrary, has been

careless, due to the demand for coal during that period I spoke of. Like all other sellers' markets, the producer, not having the necessity of producing economically, was careless in his plans for the distribution of his product, and, like all other producers, coal was not as well prepared, as well cleaned by many producers, as it is in the normal or buyers' market.

Producers of coal have realized for the last several years [fol. 442] that their selling machinery and outlets were inadequate. We have discussed it for the last five years, when coal people get together—that something ought to be done about the sale of coal. In meetings, in discussing these matters, it is often an ordinary expression that the *the* operator works hard to save a penny, and the salesman, without any consideration, gives away a dime. (488) That has been the feeling of the producers towards the sales organizations that have been handling their coal. We have discussed for a number of years the question of larger sales outlets, in order to have higher paid, better trained, better equipped sales organizations. We have discussed it in these local districts that make up this Appalachian Coals, Inc. We have discussed it in the Logan District. We have discussed it in the Williamson district. It has been discussed actively in the Pocahontas district for the past five years.

One of the questions has always been, "Well, just how will we go about it? Is there any legal way we can do this? Are individuals willing to work together to the extent of hiring these same people to sell their coal?" Numerous of them were along the lines of the examples I have given already. The Dickinson Fuel Company is selling the output of seven mines. The Southern Coal & Coke Company is selling the output of twelve mines. That is today. The Holmes-Darst Coal Company is selling the output of several mines. They are all sales agencies selling the output of mines producing coal in this Appalachian region.

The coal sold in the Appalachian region is sold in practically all the territory from Maine to Florida, and as far West as the Mississippi River in the South, and as far West as Missouri, Iowa, and the Dakotas in the Northwest, and into Canada. Dividing it into local selling areas, so that it can be (489) referred to in a more detailed way, we might first consider the coal sold and consumed locally within the

[fol. 443] districts, where it is actually produced. Then the coal going to Tidewater for trans-shipment, that is, coal shipped from this region to Hampton Roads, Virginia, to be loaded into vessels for shipment up Chesapeake Bay, and up the coast as far as New England, and occasionally up into the St. Lawrence River, and South to Florida, sometimes for export. Today, a very nominal amount is going for export. Then, coal going eastbound all rail to the District of Columbia, Virginia, the Carolinas and Georgia. Part of that is going south, instead of east, of course. Then, coal going into Tennessee and Virginia, Alabama, Mississippi, and Louisiana, coal going to the Great Lakes for trans-shipment to Great Lakes port of Lake Erie, for trans-shipment to points on the Great Lakes and the St. Lawrence River; and then coal going to the territory North and West of the Ohio River, all-rail. That should be subdivided, for convenience, into coal going to Ohio, Michigan, Indiana, and Illinois, as four of the principal consuming areas; and then coal going to other States.

(490) The 1929 production of the Appalachian region, not as shown on the map, but as I have described it here, including the 24 counties that I have described and the mines just outside the 24 counties in the high volatile surrounding area and including all the Tennessee production, was 107,000,000 tons in round figures. The total production in the outside area was approximately 12,000,000 tons. Subtracting that from the 107,000,000 tons gives 95,000,000 tons as the approximate production in Appalachian territory. That is approximately the figure in the petition.

(491) The 1929 production of the companies contracting with Appalachian Coals, Inc., was 58,011,367 tons. I do not know that this figure is identical with that in the answer, but it is practically so. The production of these companies in 1930 was 51,663,395 tons, and 42,361,771 tons in 1931. These figures are taken from the stipulation that we entered into (Gov. Ex. 2).

[fol. 444] According to the Bureau of Mines data 428,000 tons of coal were consumed locally at the mines in 1929 in the Appalachian region. That was coal for household use and local power plant consumption. Including the foregoing, in 1929 West Virginia consumed 1,769,014 tons, Virginia, 1,677,681 tons, Kentucky, 2,310,442 tons, Tennessee,

3,151,165 tons, or a total for those four States of 8,908,302 tons.

The States of West Virginia has four very large producing areas within the State that furnish coal for consumption within the State. The low volatile or Smokeless in the New River-Winding Gulf field, the central West Virginia area, and the northern West Virginia area including the Fairmont district. These are all large districts of production. The fourth is the Appalachian region.

(493) In the State of Kentucky there are two coal-producing districts. One is in southeastern Kentucky in which the Appalachian territory shown herein is a part. And then the western Kentucky district. The western Kentucky district is an important producing district and supplies large amounts of coal for consumption in the State of Kentucky. Mines in Tennessee also supply coal for use in the State of Kentucky. And the Smokeless fields of West Virginia and Virginia in 1929 supplied for consumption in the State of Kentucky approximately 262,000 tons of smokeless coal.

In the State of Virginia, in addition to the coal produced in the State, coal is supplied in that State and mined in Kentucky, in the Appalachian region, and from mines in West Virginia in the low volatile or smokeless region, and to a small extent in the northern and eastern part of the State in the neighborhood of Washington, in mines in Pennsylvania and the northern West Virginia area.

In the State of Tennessee coal is supplied from mines in the Appalachian region, from mines in central and southeastern (494) Tennessee, which are non-defendants and outside of the area shown on the map as Appalachian territory, [fol. 445] but are included within the 107,000,000 tons in the Appalachian region; from mines in western Kentucky and Alabama and to a small extent from mines in West Virginia-Virginia smokeless territory.

(495) The coal moving from the Appalachian region to tidewater meets very keen competition. The tonnage figures themselves show competition, and it is known that the 1929 shipments of coal in this Appalachian region amounted to 4,574,970 tons, out of a total tonnage to tidewater of 35,879,886 tons, or less than one-seventh of the total tonnage to tidewater. The remaining six-sevenths came from the low volatile fields of southern West Virginia, from northern

West Virginia, from the Maryland and Pennsylvania fields and possibly some others.

The freight rates to tidewater from the southern high volatile fields in the Appalachian region vary from $2.62 a gross ton to $2.72 a gross ton. In speaking of freight rates and tons, the only place where the tonnage is referred to as gross tons is the tonnage going to tidewater. That is in tons of 2,240 pounds, as against the ordinary net ton of 2,000 pounds. (496) Our freight rate to tidewater is 10¢ a ton higher than from the Smokeless districts in West Virginia and Virginia. In 1929 those districts shipped 17,451,109 tons to Hampton Roads.

Our coal going via tidewater to New England comes in competition with all Smokeless coal. It comes in competition with coal going to tidewater to the port of Baltimore, with rates at $2.25 to $2.50 a ton, and with coal going to the port of Philadelphia, with rates from $2.42 to $2.57 a ton. In giving those rates I am giving the rates without the surcharge allowed recently, a few months ago, by the Interstate Commerce Commission. But that applies uniformly for a temporary period on all roads alike; so relatively it is the same rate. In addition to the coals going to tidewater and all points north of Washington, we are in competition with all-rail coal going from Maryland, northern West Virginia and Pennsylvania to all-rail points north of Maine.

[fol. 446] In regard to foreign coals, we are in competition with coal coming from England, France, Germany, some coal coming from Russia, and we are importing some coals today from Indo-China (497).

Up until a few years ago there were several million tons of coal used for bunker purposes at the principal ports along the Atlantic Coast. That tonnage has been very materially reduced by the ships turning to oil as a source of fuel. In addition, fuel oil in large amounts is being delivered to industrial plants along the Atlantic seaboard from Florida to Maine, and is going inland for a considerable distance. It has displaced a great deal of coal. We meet it in competition in many places and have lost considerable tonnage to fuel oil.

The District of Columbia has a smoke ordinance and uses largely low volatile coal. In 1929 there were approximately

92,000 tons of high volatile coal from our districts going to this market. The total coal used in the District in that year was considerably over 1,000,000 tons. Since that time, however, the freight rates from Maryland, northern West Virginia, and Pennsylvania have been materially reduced to the District of Columbia, and there is less southern coal (498) going there today from our districts than at any time heretofore.

There has been completed within the past two or two and half years a large natural gas line from Kentucky-West Virginia fields to the city of Washington. And they are in a position to deliver large amounts of natural gas in the District of Columbia. There is a substantial amount of fuel oil used in the District of Columbia. The District of Columbia has available power from the superpower inter-connected plants along the eastern States that run from Alabama to Niagara Falls, and where power is made from water power as well as from coal.

In 1929 there were distributed in the State of Virginia 7,768,124 tons of coal. That includes the coal that was made into coke at the mines in the States. Of this amount 2,256,481 tons, or a little less than one-third, was produced in the [fol. 447] Appalachian region, and of that tonnage approximately 600,000 tons was made into coke at the mines. Virginia's principal source of supply for coal is the low volatile fields of West Virginia and Virginia. To most markets in the State these fields have a rate advantage of 10¢ a ton under the coals from the Appalachian region. A small amount of coal came into Virginia from northern West Virginia and Pennsylvania and Maryland. A little coal came (499) in from Tennessee and Kentucky. The coal coming into northern Virginia and the Washington territory comes in at lower rates than ours. That is true in the upper Shenandoah Valley.

The State of Virginia produced approximately 12,000,000 tons in 1929. Competition is very keen in that market. Large natural gas lines have been built from the gas fields of West Virginia and Kentucky into many of the principal consuming markets in the State within the past two years. Fuel oil has become an important competitive factor along the seaboard.

In 1929 there was distributed for consumption in North Carolina 3,251,337 tons, of which 2,197,545 tons came from

the Appalachian region, and with the exception of the small tonnage produced in the eastern part of the State, the remaining tonnage came from the Smokeless fields of West Virginia and Virginia. (500) North Carolina has a small coal field in the eastern part of the State. I refer to the mines around Sanford. Mr. Evanson will probably have something more to say about that in his testimony.

Now, referring to the map, Defendants' Exhibit 9, there are four separate distributing areas in North Carolina where the freight rates from the producing districts affect the market, under normal conditions, to a material extent. In the area marked "4" on this map, coals from the Smokeless region reach that territory at 20¢ less than the rates from the Coal Creek, Tennessee, region, and 10¢ less than [fol. 448] the rates from that part of the Appalachian region in the State of West Virginia.

I do not have the figures (501) for the Smokeless coal going into that area. I do not believe they are segregated. In that area "5" the rates from the Pocahontas and New River District—and in using the term "Pocahontas and New River" we include all the Smokeless producing areas in Southern West Virginia and Virginia, which include the Winding Gulf area and the Greenbrier district. The general name in the trade is used to apply to all those local districts. In that area the rates from the Pocahontas district are the same as the rates from the Coal Creek district in Tennessee. The rate is 10¢ under the rate from the Appalachian districts of Kanawha, Logan, and Williamson that are located in the State of West Virginia.

In the area in green, marked "6", the rates from the Pocahontas-New River district are 20¢ more than the rates from the Coal Creek district in Tennessee, which means that the rates from the high volatile Appalachian districts in West Virginia are 30¢ more than the Coal Creek. The rates from the Virginia district to that area are the same as the rates from Coal Creek. Coal Creek is used as a base district by the Interstate Commerce Commission. Coal Creek is in the Appalachian region, in the State of Tennessee. (502)

The areas marked "4," "5," "6," and "7" on the map were made up by the railroad traffic people in filing their rates before the Interstate Commerce Commission, and the

rates were approved to those areas by the Interstate Commerce Commission in order to work out a relationship of rates, and we just took the railroad tariffs as to the territory, referring to coal only. For instance, take the area marked "4," every point in that area has, from the Smokeless fields of West Virginia, the same freight rate, and from the Appalachian fields in West Virginia, the same freight [fol. 449] rate, but from Coal Creek in Tennessee it has a rate of 20¢ a ton higher. The Commission and the railroads attempted, apparently, to divide that territory up to give the northern end of the Appalachian region an advantage of 20¢ a ton in the brown area, marked "4"; to give the West Virginia Appalachian region and the Coal Creek the same rate to the area marked "5"; and the Coal Creek, in the area marked "6," an advantage (503) of 20¢ a ton, Coal Creek over the Smokeless, and 30¢ a ton over the high volatile districts in southern West Virginia, in the Appalachian region.

In the area not colored on the map, in western North Carolina, there is no differential relationship between the rates. The rates vary between the different towns and communities, from the various districts. That is a district where the consumption of coal is not large, but is important to the coal consumer in that district. The most advantageous rates they have are from Tennessee and Virginia. The next rates are from the eastern Kentucky field, including the Harlan and the Big Sandy district, and the Jellico-Middlesboro district, that lies across the Kentucky-Tennessee line. To any point like Asheville, to ascertain what the rates are from the various districts, you would have to give a long detail in order to get the rates. The Smokeless rates to Asheville are materially higher than from these other districts.

By Judge Soper: May I ask you whether you have been going over is the explanation why two-thirds of the coal used in North Carolina is Appalachian coal? Is it due to a favorable freight differential?

A. Not entirely. It is partially in spite of an adverse freight rate differential from the Smokeless fields.

Q. Why is it that they are able to sell down here in spite of the disadvantage?

A. There is a wide variation in the prices made at different mines on their coal, and coal producers, under pressure [fol. 450] (504) to run their mines and sell coal in the Appalachian fields, have made lower prices, or more attractive prices, to the Carolina district than the Smokeless producers. I think that is the explanation as to why they have the bigger tonnage in the market.

The price of Smokeless coal is generally higher than the price of Appalachian coal. It varies from period to period, but generally it is higher, and for general steam purposes it is usually worth more money. Other things being equal, the industrial trade is usually willing to pay more for it, because they can evaporate more pounds of water, more steam, with a pound of average low volatile coal than they can with a pound of the average high volatile coal. There is a difference of from 5 to 7% in the delivered value of the average Smokeless coal for steam purposes, as compared with the high volatile coal. When you take the freight rate into consideration, that makes a material difference in the delivered price.

Q. It makes it all the more difficult to understand why you are so successful in North Carolina, does it not?

A. It is purely a question of salesmanship and price competition to the greater part of the State. To the (505) western area of the State the Smokeless rates are very much higher, and very little Smokeless coal goes there; but to three-fourths of the State, as indicated on the map, Smokeless coal can go in at an even or lower rate than any Appalachian coals.

(506) Years ago, the percentage of Smokeless coal was greater than it is today. Formerly, the railroads of this area burned Smokeless coal. The Atlantic Coast Line, for instance, burned Smokeless coal. But it is a slower firing coal; does not get up steam quite so fast in a railroad locomotive, and it being somewhat more valuable, they had to pay a little higher for it. And so I think that practically all the coal used by the railroads in North Carolina today is high volatile coal. There is a good deal of personal preference by consumers. Many consumers of domestic coal [fol. 451] want low volatile coal on account of its having less soot, looking cleaner, and holding fire longer than the average high volatile coal. But other customers want coal

that will make a long flame, a high blaze, and down in this Southern country especially, people still use stoves and open grates to a large extent, and want to see the fire, and that also affects the use of the coal.

Of the coals from the Appalachian region going into (507) North Carolina in 1929, slightly over 700,000 tons came from West Virginia and Kentucky fields on the Chesapeake and Ohio and Norfolk and Western Railroads. Now, these railroads had the advantage to the brown territory, of an equal rate to the orange territory, and it is reasonable to assume that it went into that territory, but I do not know that as a fact. Approximately 600,000 tons from Southeast Kentucky, Harlan and the Tennessee fields went into North Carolina. And as the railroads from that territory go more directly into the western and southern parts of the State, it is reasonable to assume that the coal went in that direction. The State of Virginia supplies 862,000 tons of coal to the State of North Carolina, and that could have gone to any part of the State.

All of the Appalachian region has rates to, and supplies coal to, the North Carolina markets, with the exception of what is known as the Hazard-McRoberts district. That district has no Southern railroad connection and supplied no coal to that region. The production of defendant companies in that particular district in 1929 amounted to 2,955,190 tons. (508) The production of non-defendant companies, other than captive, and the captive tonnage from that district, was equal to, or greater than, the tonnage of the defendant mines. But the total as compared with the production of the Appalachian region, of 107,000,000 tons, that was produced in that region, was comparatively small.

By Mr. O'Brian:

Q. If I might interrupt you, I am not clear why you include the captive mines together with the independent [fol. 452] mines. Is it because you think they sell in the ordinary commercial markets?

A. A number of them sell in the ordinary commercial markets. We have no way of knowing how much they sell. We do know that the Fordson Coal Company, owned by the Ford Motor Company, has a capacity of approximately 2,000,000 tons, and sells coal in the open market.

Q. I was wondering whether it was quite a fair basis when speaking of the competition of your people, the Appalachian, with those outside the sales agency, to include as competitors with you the captive mines, that ordinarily do not sell in the commercial market, unless we know just how much they are selling in the commercial market. A captive mine does not primarily sell in the commercial market?

A. The reason we include them is that in the past two years a number of mines that were formerly captive have become commercial. (509) And the tendency may be said to be in that direction. For instance, the Wheeling Steel Company quit using their own coal, and began to sell it on the open market.

Q. Well, I was wondering if it was quite a fair basis to call the captive mines competitors of your selling agency, that is, the total capacity of the captive mines, unless we know just how much of that captive coal goes into the commercial market in competition with you?

A. A reasonable explanation of that is that usually a captive company will use its own coal when it is to its advantage to do so. Some of them have not sold coal in the competitive markets at all. Others sell a substantial portion of their coal in the competitive markets. We have no way of dividing it. It is all productive capacity, and any of them may become competitors at any time that it becomes advantageous to them to do so.

To the extent that the owners of the captive mines use the production of captive mines, to that extent that coal does not go into the commercial market in competition with us. I wanted to make that clear, and meant to make it clear yes- [fol. 453] terday. But large companies like the Koppers Company use their slack coal largely in their own by-product coke ovens, but not altogether; and they sell (510) their lump coal and egg coal and stove coal as commercial coal.

Some of the captive coal is in active competition, and practically all of it is a reservoir if it becomes to the advantage of the owners of those mines to sell it, in other words, potentially competitive. For example, the United States Steel Company is probably the largest producer of captive coal in the Appalachian region, and in the Smokeless region. They have never up to now, to my knowledge, sold any of their coal in the competitive market. But within

the current year they have gone to their lessor, the Pocahontas Coal & Coke Company, in the Smokeless fields, and secured an agreement to modify their lease whereby it gives them permission to sell in the competitive field. Heretofore their lease forbade their selling any coal in the competitive market. We do not know that they are going to sell it, but the very fact that they have secured a modification of their lease, makes us think there is a probability that they are going to do it. At least, they would be in a position to do if they desired.

[fol. 454] Volume 2 (516) Mr. O'Brian: When Mr. Hal E. Booth was called yesterday by the defense out of order, and I consented to his examination, I overlooked the fact that he was vice-president of the Pittsburgh Coal Company, interested in this proceeding in that one of their subsidiaries, the Pike Floyd Coal Company, is a defendant in this case and Mr. Booth is himself the chairman of the Regional Sales Subcommittee for Western Pennsylvania, which has been engaged in organizing a similar plan. In order to make these facts clear on the record, I should like to offer this letter, addressed to me, in which he indicates the situation.

(517) Thereupon the papers offered by the Government were received in evidence and marked "Government Exhibit No. 17," and are as follows:

GOVERNMENT EXHIBIT No. 17

"Pittsburgh Coal Company, Pittsburg, Pa.

"Hal E. Booth, Vice-President

May 18, 1932.

"Mr. John Lord O'Brian, Assistant to the Attorney General, Department of Justice, Washington, D. C.

"DEAR SIR: Mr. J. D. A. Morrow has asked me to reply to your letter addressed to him on May 13th. His reason for asking me to answer it is because I happened to have been the chairman of a committee which considered, for the Pittsburgh District, a regional sales plan. A brief

history of the consideration given to some sales plan follows:

[fol. 455] "On January 6, 1932, a committee of operators local to Pittsburgh met for a general discussion, out of which developed a sentiment in favor of a thorough canvas of the situation in the (518) Pittsburgh District, to see if some regional sales plan might not be developed to conform to conditions existing here. A committee of nine members, six being representative operators and three lawyers, was appointed to make a study. Three full days were spent by this committee on January 11th, 12th and 13th, in studying regional sales plans and in trying to develop one that would conform to the needs of the coal operators in the Pittsburgh District; two other full days were devoted to the subject on January 27th and 28th. On the latter day, the committee learned of a telegram sent to Appalachian Coals, Inc., by your office. The committee saw no need at that time for giving the matter further consideration, and therefore adjourned without taking any action. There the matter now rests.

"The producing territory involved was not definitely outlined, but in general consisted of what is known as the Pitsburgh District, or that district immediately adjacent to the city of Pittsburgh. There was one circular letter and question-aire prepared; this was sent to about seventy-five operators—copy of the circular letter and a copy of the question-aire are attached. No booklets were printed, no publications were issued, and no formal resolutions were recorded.

"We are sending a copy of this letter to Mr. J. D. Francis, President of Appalachian Coals, Inc.

"Yours very truly, (Signed) Hal E. Booth, Vice-President.

[fol. 456] (519) "Regional Sales Subcommittee for Western Pennsylvania

"Headquarters: Duquesne Club, Pittsburgh

"January 12, 1932.

"On December 3, 1931, there was held in New York City, a conference of representative coal men for the purpose of recommending some plan by which the coal industry might

be stabilized, or at least greatly improved. At that meeting it was determined that the quickest way to accomplish the purpose was to establish regional sales companies, and to that end, committees were appointed for each district throughout the country.

"The committee for Western Pennsylvania met on January 6, 1932, and appointed a sub-committee of nine members consisting of sales executives and their legal advisers. This committee now addresses you as an operator in this district, having a vital interest in the development of the regional sales plan outlined in the enclosed pamphlet approved by the New York Conference referred to. One of the first essentials of this committee's deliberations is a complete knowledge of the coal actually produced in 1929, 1930 and 1931 at each operating mine, also the potential capacity of each mine in the district. The committee asks you to supply your part of the information, by answering and returning the enclosed question-aire by Saturday, January 16th, 1932. In the eyes of the committee, the promptness of your response must obviously be considered as a measure of your interest in the effort to develop for this district, a regional sales plan.

"Yours very truly, (Signed) Hal E. Booth, Chairman."

[fol. 457] (520) "Separate Report for Each Mine

"Questionnaire for Use Solely by the Pittsburgh District Regional Sales Committee

"Date: —— —, ——.

"Number: ——.
"Information Supplied by: —— ——, Producer.
"Name of Mine: ——.
"Location: ——.
"Railroad: ——.

	1929	1930	1931
Coal tonnage shipped to market	....	....	....
Number of days worked	....	....	....
How much of above tonnage did not enter into competitive market?	....	....	....
How much of above tonnage moved to market by truck?	....	....	....

Give your own estimate of tonnage of coal this mine can now produce and ship to market on full operating time of 300 days per year: ——.

Mail to Regional Sales Sub-Committee of Western Pennsylvania, Duquesne Club, Pitsburgh, Pa., before January 16th, 1932."

[fol. 458] (521) JAMES D. FRANCIS, a witness theretofore called on behalf of defendants and who had been duly sworn, resumed the stand for further examination, as follows:

Direct examination resumed.

By Mr. Donovan:

With reference to Defendants' Exhibit No. 9, the Virginia district to points north and west of the Ohio River generally is in the Outer Crescent group. That is, to the Lakes, it carries the Outer Crescent rates and to the principal consuming centers like Detroit and Chicago it carries the Outer Crescent rates, to the territory marked No. 2 on the map (522) introduced as Defendant's Exhibit No. 9. It carries a rate of 25 cents a ton more than the remainder of the Appalachian territory, and therefore its natural markets are in the South, and it is along with Coal Creek enjoying an advantage to those markets. And having that advantage to those markets, it is natural that, with that advantage to those markets, it would seek first to supply that market as a home market. It is the market to which they have the lowest freight rates. In the event that Appalachian Coals, Inc., attempted to raise the price in that market, the natural effect of this fact would be that the non-defendant companies would attempt to supply that market before shipping their coal into the more highly competitive markets north and west of the Ohio River where they have such material freight-rate handicaps. In other words, the tendency would be to come in and cut under Appalachian Coals, Incorporated.

We are talking about Western North Carolina particularly, and South Carolina and Georgia.

[fol. 459] (523) And the same advantage would be true in the States of South Carolina and Georgia, as well as in Western North Carolina.

(524) With respect to the competitive situation in the state of South Carolina: South Carolina is comparatively a small consumer of coal, consuming in 1929 2,400,025 tons of coal. The Appalachian territory supplied approximately 96 per cent of the coal going into South Carolina. The remainder of the coal going into South Carolina largely came from Alabama and the West Virginia-Virginia Smokeless fields. There was a small amount of anthracite consumed in South Carolina.

In 1929 the Smokeless fields supplied 4.28 per cent of all coal going into South Carolina. In 1918 the Smokeless fields supplied 20.61 per cent of all coal going into South Carolina.

In 1929 Alabama furnished a very small amount of the coal going into South Carolina.

The exhibit shows 1,743 tons out of the two million (525) odd tons. Anthracite supplied much more than Alabama. Anthracite supplied something over 25,000 tons.

Coal is available to South Carolina from Tennessee included in this Appalachian region shown on the map. Also from central and southern Tennessee, from all of the Virginia fields, from the Harlan, Middlesburg, Jellico fields and the eastern Kentucky fields on the Chesapeake and Ohio. It is also available to the eastern part of the state from all of the Appalachian region in the State of West Virginia. It is not available from the Hazard district. [fol. 460] The total capacity of the non-defendant mines, captive and non-captive, located in the Appalachian district is as given by Mr. McGarry—82,000,000 tons.

48,000,000 tons was the actual production in 1929. (526) That includes the captive mines. The captive mines produce 16,000,000.

Sixteen million tons, approximately, are in the outlying territory. But the mines in the Hazard district should be taken from that tonnage in each case. The Hazard district aside from the defendant companies having a production of approximately three and one-half million tons. Of course all these coals going to the state of South Carolina from the various districts may have varying freight rates to different points. And another witness will give illustrations of the freight rates and tonnage to the various consuming centers from various producing districts.

With respect to the State of Georgia: The state of Georgia, as shown on Eavenson map Defendants' Exhibit No. 9, used in 1929, 3,024,614 tons, of which 2,541,533 tons, or 84 per cent, was supplied from the Appalachian region. Alabama was the next largest source of supply with 460,000 tons. (527) There was produced in the state of Georgia 136,000 tons. A certain amount of smokeless coal was shipped into Georgia. Alabama is, however, the largest potential source of supply for consumption in the state of Georgia other than the Appalachian region.

[fol. 461] (528) According to the exhibits filed by Mr. McGarry the rated productive capacity of Alabama is approximately 24,000,000 tons and in 1929 the actual production of Alabama was 17,000,000 tons.

Georgia is a relatively small consumer of coal.

The ability of the non-defendant mines to come in and cut under the price of the defendant mines would be the same in the three states of Georgia, South Carolina and North Carolina, which I have discussed. The competitive situation as to those three states is practically the same. Of course, as to Georgia, Alabama is nearer and has a more competitve freight rate situation. The mines in Alabama are closer than the mines in the Appalachian region to many points. Of course, Georgia is just east of Alabama, very near the Alabama coal fields, and the Carolinas are, progressively, a little farther away. (529) Natural gas from Louisiana and Mississippi has been carried into Georgia by large pipe lines in the last two or three years.

I have prepared a chart which will show the total amount spent by the manufacturing industry in Georgia for heat, light and energy in 1929, showing how much of this was for bituminous coal and how much for other items. That shown is for manufacturing industries. Whereupon the chart referred to, showing total amounts spent by manufacturing industry in Georgia for heat, light and energy in 1929 was offered and received in evidence and marked Defendants' Exhibit No. 10.

The last item on this exhibit which indicates purchased electrical energy having a total value of $8,441,000, does not show how much of that energy was generated by the [fol. 462] use of coal. I have no statistics as to that, but Mr. Eavenson will supply that.

(530) By Mr. Donovan:

This chart is taken from a report of the Census of Manufacturers for 1929, to which I referred yesterday, and which was used by Mr. Tryon in his testimony and is taken from page 12 of that report. 30.25 per cent of the amount spent for heat, light and energy for 1929 was spent for bituminous coal in the state of Georgia. In the same year 54.76 per cent was spent in the state of Georgia for electrical energy. I am not prepared to show what proportion of bituminous coal went into that electrical energy.

By Judge Parker:

This is the percentage of the value in dollars spent—that is delivered, including freights at the plant. This is the cost at the plant in every case.

By Mr. Donovan:

I have a similar statement in regard to North Carolina.

(531) Whereupon the paper referred to, chart showing total amount spent by manufacturing industries in North Carolina for heat and light and energy in 1929 was offered and received in evidence and marked "Defendants' Exhibit No. 11."

I desire to add, in regard to the memorandum at the bottom of that report, that the statement that the Appalachian district shipped into Georgia in 1929, 2,253,533 net tons of bituminous coal, does not come from the statistics of Manufactures, and that percentage does not come from there. That is taken from the figures used in Defendant's Exhibit 9, and is put in as an explanation.

By Judge Soper:

[fol. 463] Some of that two and a quarter million tons of coal goes into the electric energy.

(532) By Judge Parker:

With reference to the purchase of electric energy in Georgia, I understand the figures represent purchases by the ultimate consumer. That is what it purports to show.

By Mr. Donovan:

With reference to this exhibit showing quantity and values of the fuels used in the manufacturing industries of North Carolina in 1929, the percentage of bituminous coal in value of dollars was 29.26 per cent. The percentage of purchased electricity used in value of dollars was 66.35 per cent. The paragraph beginning "Appalachian Districts", the three bottom lines, does not come from the census of manufactures, but comes from information of the shipments into the state. The note on the bottom covers all the coal shipped from both defendant and non-defendant companies in the Appalachian District. We have no way of knowing from the railroad figures on which these distribution figures are based, whether they were from the defendant or non-defendant mines.

(533) By Judge Parker:

The discrepancy between the total of bituminous coal used in North Carolina in 1929, as shown by Exhibit No. 11 and shipments as shown on Defendants' Exhibit No. 9, is due to the fact that the figures in the census statistics on manufactures, Defendants' Exhibit No. 11, covers only the coal distributed and used in the manufacturing industries and did not include the coal used for household purposes and purposes other than manufacturing.

[fol. 464] By Mr. Donovan:

So far as I know, there are no statistics breaking down the other uses. Exhibit No. 11 is an indication as to the use of coal and other fuels and it is along the line of the figures put in by Mr. Tryon, the Government's first witness.

By Judge Parker:

There is no coal used in hydro-electric plants. But some hydro-electric plants do have standby steam plants. (534) These standby plants use coal in low water stages when they do not have sufficient water and do not get sufficient power from their interconnected companies that do have water. That is included in these electric energy uses, of course. And we do not know how to divide them. In other

words, the statistics cover the purchases of coal by the producers of electric current.

By Mr. Donovan:

The terms "purchases of electric energy 66 per cent" applies solely to electrical enegry used in the manufacturing industry, consumption and cost to manufacturing industries, and does not include electrical energy for domestic uses. If a householder uses electricity for lights, or an electric stove or other purposes that would not be included in the manufacturing industry.

I have a similar table for South Carolina which was prepared in the same manner and on the same information as the other tables. (535) Whereupon the defendants offered in evidence a tabulation with reference to South Carolina, which was received in evidence and marked "Defendants' Exhibit No. 12."

I might say that Mr. Tryon in his testimony reduced these electric figures as I understood his evidence, to tons. We in these exhibits are giving the dollar value, and we [fol. 465] are both using different parts of the same report for this information.

By Mr. O'Brian:

My understanding is that the amount of coal shown here was partially used in the making of electrical energy. (536) That is the basis on which I am testifying.

By Judge Soper:

Q. How does it add up? Following that question by Mr. O'Brian I do not see how it all adds up to 100 per cent. Maybe I am confused from an arithmetical standpoint. What I am getting at is this: The value of the coal in the three million tons, for instance shown in Defendants' Exhibit No. 12, is 26 per cent of the whole. But at the same time a part of that coal has been transmitted into another form of energy, namely, electrical energy, and there it appears to be 66 per cent of the whole. Am I right or wrong in supposing that some of the same items, or rather, some of the same material in value, has entered into both of these percentage figures?

A. Yes, you are right that some of the material has entered into both of the energy figures, that the manufacturer of power has purchased coal and that goes into his cost. Then when he sells it that goes into the total, making the 100 per cent.

Q. Whoever consumes the thing, that is to say, these percentages are assigned to the consumers in each instance, do I understand?

A. The consumer in each instance.

Q. And sometimes the consumer is a manufacturer at the same time.

[fol. 466] (537) A. Yes.

Q. And a manufacturing consumer is one and the same.

A. Yes, sir; he may be one and the same.

By Mr. Donovan:

The percentage of the value of bituminous coal used in the manufacturing industries in the state of South Carolina shown by Defendants' Exhibit 12 was 26.05 per cent; electrical energy 66.33 per cent. With reference to the notation at the bottom of the page of the percentage of coal from the Appalachian district shipped into South Carolina, I have the same comment to make in relation to shipment of defendant and non-defendant coals. For example, that shows that the Appalachian region shipped into the state 2,295,000 tons plus. That the manufacturing industry only consumed of that 852,000 tons plus. Leaving the difference to be consumed by domestic consumers and others.

By Judge Soper:

Q. If we desired in this state of South Carolina to increase the amount of electrical energy would we be obliged to increase the consumption of coal?

A. The increase might come from water power, fuel oil, natural gas or coal. It would be up to the manufacturer of the electricity to decide which was the most available and most economical source of supply.

(538) Q. Well, you mean to say that there is an unlimited amount of waterpower there which could be used, which is not now being used?

A. There is a great deal of water power now being developed and that is not now in use in this eastern Piedmont section.

[fol. 467] By Mr. Donovan:

I have prepared a similar table for the state of Virginia.

Whereupon the Defendants offered in evidence a table giving the quantity and value of fuels used in the manufacturing industries in the state of Virginia for 1929, which was received in evidence and marked "Defendants' Exhibit No. 13."

This exhibit shows that of the total quantity and value of fuels used in the manufacturing industry in the state of Virginia in 1929 coal constituted 51.10 per cent and purchased electric energy 32.84 per cent. The non-defendant producers in the Appalachian region ship into the state of Virginia as well as the defendant producers. (539) I do not know the portion or percentage shipped by non-defendant producers. I do not think that it would be possible for the Appalachian producers who contract with Appalachian Coals, Incorporated, to in any way monopolize the market for coal in the states of Georgia, North Carolina, South Carolina or Virginia. I do not think that they would have it within their power through Appalachian Coals to fix the market price there. My reasons are: The consumption of coal in these states is relatively small. The production of coal by the non-defendant producers in the Appalachian area that have this territory as their natural markets exceeds the consumption in these states. In addition there is available in these states smokeless coal from the southern West Virginia-Virginia area; coals from the state of Alabama; and there is also available other competitive fuels consisting of hydro-electric power, fuel oils and wood which is used extensively in all these states.

The production of non-defendant producers exceeds the consumption of these four states. The production of the non-members, including captive (540) mines exceeds the consumption in the four states approximately five times. [fol. 468] Excluding captive mines, approximately three times. I have not worked out those figures accurately, but I am giving them mentally, and I am sure they are correct.

By non-members I meant non-members in the Appalachian district and I meant the four states combined; and I am not having any reference to the Alabama or smokeless fields. The productive capacity of the non-defendant producers in the Appalachian district, as testified yesterday by Mr. McGarry, including captive mines of the non-defendant companies, was approximately 82,000,000 tons. But in considering this area the productive capacity in the Hazard district, which would not amount to 10 per cent of the productive capacity of the defendant companies, which would not be available to this territory, should be eliminated so far as this territory is concerned. (541) The productive capacity of the non-defendant producers located in the Appalachian district would be materially greater than the actual production of these mines, which actual production, including captive mines, is five times the consumption of these four states. It would be materially greater eliminating Hazard. The combined consumption of the states of Virginia, South Carolina, North Carolina and Georgia, as shown by Defendants' Exhibit 9, is approximately 13 million tons, and the capacity, eliminating Hazard, would be approximately 73 million or 74 million tons. That includes captive mines. We have no breakdown of the figures between the non-defendant companies, captive and non-captive.

By Judge Soper:

(542) In the four States of North and South Carolina, Virginia and Georgia, the Appalachian district distributed in 1929 approximately 9,200,000 tons out of a total production of 107,000,000 tons in the Appalachian area, or approximately 95,000,000 tons in the region shown on the [fol. 469] map as the region including the defendant companies, which would be from 8 to 10 per cent of the total. In other words, 9,200,000 tons distributed from the Appalachian region would be almost 10 per cent of the 95,000,000, and almost 8 per cent of the 107,000,000.

By Mr. Donovan:

I stated yesterday that in the region that we have designated as the Appalachian region there was included a production of approximately 95,000,000 tons, but in the im-

mediately contiguous territory there were certain mines that produced approximately 12,000,000 tons of the same quality of coal going into the same general markets on approximately the same freight rate structure. (543) The coal produced in the territory designated as Appalachian amounted to 95 million tons and there would be an additional 12 million tons from the mines immediately contiguous, always remembering that Hazard has no rates to this territory and that constitutes not to exceed 10 per cent.

By Judge Soper:

Q. When you were talking about the fact that the production of independents, or non-members, as we may call them, is five times the consumption in these four States, all the material there produced is scarcely available for this section, in view of the fact that only 8 to 10 per cent of the Appalachian territory production has heretofore gone into this territory.

A. It could go, if there was demand, but in a market where there is a limited demand, only such part goes as fills the demand.

[fol. 470] By Judge Soper:

Q. Of course, if there is any influence by reason of this institution, on prices, there is going to be just as much demand elsewhere, or, at least, there will be demand elsewhere, as there is in the four States you are talking about.

A. (544) As I understand the Government's contention, this particular area——

Q. That is the one they emphasize.

A. (Continuing:) —does not have the opportunity to buy from the producing areas in Pennsylvania, Ohio, Indiana and Illinois, and it makes it less competitive than those markets.

By Mr. Donovan:

There are more competitive factors in the other areas where Appalachian coal goes, than there are in this area. There is greater production of coal in the consuming markets north and west of the Ohio River.

If Appalachian Coals, Incorporated, did constitute a monopoly, this particular section would be at its mercy more than any other section. And I am addressing myself to the factors that would prevent this from being brought about because these four states have no other protection than the factors I am mentioning.

By Mr. Donovan:

These four states are the natural or home markets of substantial parts of the Appalachian territory, (545) but not any more so than of the Smokeless region. The areas marked "4" and "5" are more the home market of the Smokeless region, than of the Appalachian, because the former has equal or lower freight rates to that market. [fol. 471] It is closer to it than the other markets. From a transportation standpoint, the Smokeless fields of West Virginia and western Virginia lie south and east of Appalachian territory. Therefore they would be nearer from a mileage standpoint to North Carolina and certain parts of South Carolina. I tried to break down these figures last night, as to the districts in the Appalachian territory, with the tonnage of defendants and non-defendant companies, that reached this market on the lowest freight rates. While we made the breakdown, we did not have time to write it up, and so that information will be furnished to the court by another witness.

By Mr. Donovan:

Appalachian coal shipped into the four states approximated 9,200,000 tons of coal. (547) The competition with other fuels, and the limited demand in these regions, just means that there isn't a demand for more coal. You do not ship into a region more coal than the region consumes. We are not asked for any more coal.

Our experience, and we are producers of Smokeless coal as well as producers of high volatile coals from the Appalachian region, is that Smokeless coal and Appalachian coal are in competition for domestic purposes in practically all uses; that they are competitive for manufacturing plants, for practically all uses; that sometimes in manufacturing plants we have to change the draft or the feeds to the stokers, have to change the thickness of the coal bed

in the boilers or the firebox, and that there are a number of mechanical adjustments that are made in using the different kinds of coal. But we sell large quantities of both [fol. 472] kinds of coal to the same manufacturing industries, and they (548) use the one they get at the cheapest price, efficiency considered.

And I might say that they use the same coals in the same boilers. Now, there are different construction of boilers, but there is generally enough elasticity to use Smokeless coals or high volatile coals in the same boilers. And for the last two years the tendency has been to install plants, not to burn special coals, but to burn the most available and most economical coal, in order that they may use a wide range of coals. That is the tendency in the construction generally for manufacturing industries, in electrical energy producing plants, and in big plants generally.

In the manufacture of gas, high volatile coal is the accepted coal generally for such manufacture. I do not know of any modern gas plant making either illuminating gas or gas for industrial purposes that uses exclusively low volatile coal. Sometimes when they are making coke and want a mixture for their coking purposes, they use a percentage of each. But I do not know of any gas plant using low [fol. 473] volatile coal exclusively, where the principal product it is desired to obtain is gas. All these plants have a primary purpose, and they make gas and coke and other by-products, and it depends upon just what their primary purpose is, as to what coal they select.

(550) By Judge Parker:

Q. I would like to have your answer to this question, as to why a separate selling agency was organized for Smokeless coal? They seem to be in approximately the same territory, and, as I understand, have approximately the same problems. Why was a separate selling agency authorized for this particular branch of the industry?

A. The selling agency in the Smokeless territory obtained a charter to see whether or not they could organize. They have gone no further and they have not organized. But there is keen rivalry and keen competition between the two regions. The large majority of smokeless or low volatile operators have no interest in high volatile coals.

and they claim to have and do for a great many purposes have a superior product, and they value highly their trade name and their so-called Smokeless Coals, and the special uses to which they can put them. And they desire to keep the advantages—what they consider their especial advantages.

Q. Now I do not know but I imagine that the Government is going to make the contention something like this, that the real purpose of your selling agency is to eliminate competition between the various producers, and that the Smokeless people were not brought into the selling agency, your particular selling agency, because there was no competition, as they, I imagine, will contend—no practical competition between the Appalachian and Smokeless. Now your answer to that is that there is competition?

[fol. 474] A. There is very keen competition.

Q. Well now, as bearing upon that issue there I would (551) like to know why even if Smokeless was not willing to organize as a group, various smokeless companies did not come into Appalachian?

A. Well, it was never considered by the Appalachian group that it was a desirable or a possible association for this purpose, that an agency selling high volatile coals would have to establish an entirely different department generally for the sale of Smokeless coals. And it was really not discussed. The competition and the difference in the quality of coals, the difference in the structure of the coals, to some extent the difference in the use of coals, was so generally realized that there was no discussion that there might be a possibility of the two competing fields working together in any way from a sales standpoint.

By Mr. Donovan:

It was the purpose of the Appalachian Coals Agency to stimulate the uses of high volatile coal, and in competition with smokeless and all other coals.

By Judge Soper:

Q. On page 25 of the Government's bill there is this statement, which seems to be an admission that there is competition between the two products:

"The production in the West Virginia Smokeless Field is quite generally competitive with Appalachian coal."

My understanding of the way you differentiate then is that while they may be competitive they are not competitive on the same basis? They have not got equal facilities? [fol. 475] The (552) Smokeless has frankly, you have said, certain advantages which the high volatile coals do not enjoy?

A. And the high volatile have certain advantages or think they have certain advantages. For domestic and household use the Smokeless producer claims and the market accepts his claims in many cases, to be in the coal trade the next best coal to anthracite. Now there are certain of our high volatile producers that claim to have coals that are the equal or better for domestic purposes than smokeless. But generally speaking, for household purposes, apartment houses, and that type of heating, smokeless coals have an advantage in the market. For steam and electrical plants along the Atlantic Coast—Boston, New York, Philadelphia—the very fact that smokeless has shipments to that territory of 17,000,000 tons as compared with 4½ million tons from our territory, indicates that the consumers in that particular territory prefer it. Many of the large cities—in fact I think most of the large cities—have smoke ordinances limiting the volatile matter that can be used in the hearts of the cities. And that is one of the advantages. The smokeless producers are attempting to have other cities adopt such smoke ordinances. I understand a witness will be introduced here to show that recently a smoke ordinance was adopted in the city of Asheville that practically excluded Appalachian coals from Asheville and was later rescinded. That will be introduced by a later witness.

Q. Well, how do you account for the fact if they are competitive, excluding household purposes, if the two coals are interchangeable for manufacturing purposes how do you account for the fact that, for instance, in South Carolina (553) there is such a tremendous preponderance of the use of the high volatile coals over the smokeless? [fol. 476] A. It is very hard for even us coal operators to account for why one consumer buys one coal in preference to another.

Q. Well, we have got a whole state that we are talking about now.

A. It is a matter of delivered price largely.

Q. Well, can they not compete with you? Can they not furnish as low a price as you do?

A. At times they make materially lower prices. They are driving us out of a lot of industrial markets right today. *Q.* Take North Carolina, the state we are now in, about 2,200,000 tons of Appalachian coals and 1,100,000 tons of smokeless, or two to one.

Q. Is there any explanation that you can offer of that except the peculiarities of human nature?

(555) A. That, and the variation in price from time to time. I think today you would probably find that that is varying, and the Smokeless has a greater percentage than it had in 1929.

By Judge Soper:

Q. It seems to me that the point that Judge Parker brought out was very interesting, namely, the fact that the Smokeless people just did not want to unite with the Appalachian, because they felt that they had certain advantages, and that they were in a somewhat different class. I got the same impression yesterday from your explanation as to why the surrounding territory, which sells a high volatile coal, did not come into the Appalachian group. You said that that surrounding territory had certain advantages in freight rates and one thing and another, over the Appalachian territory, which made it inadvisable, from their standpoint, to come in; and the conclusion that I drew—and I am stating this to get you to correct me if my conclusion is wrong—is that it was the general purpose which underlay the formation of these groups to put into each group the producers who competed under like conditions. Is that right, or wrong?

A. That was the general basis. With respect to this surrounding territory, this 12 million tons of scattered pro- [fol. 477] duction, we would have liked to have had a large portion of that contract with Appalachian Coals, Inc., but they elected not to do so.

By Judge Parker:

Q. Is this true, that the Smokeless people feel that they have an advantage in the grade, and that they would lose that advantage if they went into a common selling agency with (556) the Appalachian people?

A. It has never been discussed between the two. It has never really been considered, but Smokeless producers, as a rule, take the position that they have a superior product to the high volatile producers, and that they can go into smoke-ordinance cities and that they can have that advantage, and that their coal carries, on the average, a higher b. t. u. per pound, which is a higher heat value, and that feeling has existed so long that the matter was never given any consideration. It was just thought of as one of the things that was not possible, just as it was never thought possible or desirable that we work with Pittsburgh, or work with Ohio.

By Judge Northcott:

Q. Before we leave this question, Mr. Francis, of the monopoly of this Southern market, or virtual monopoly, by the high volatile, is it true or is it not true that the Smokeless people have a market they prefer, where they [fol. 478] can get a higher price than they can get in this market—for instance, in these cities where their coal is the only coal that can be used, because of the smoke ordinances?

A. That is one of the things, and a number of the Smokeless producers do fight rather hard to maintain their (557) position in the Carolinas, but there is less Smokeless coal than there is high volatile coal. Of the total national production of coal, about 20 per cent only is so-called Smokeless, and a little more than half of that is produced in Southern West Virginia and Virginia. It gives them a wider range to cover. They cover a bigger territory.

Q. Then, there is less danger of overproduction in the Smokeless, than there is in the high volatile?

A. Yes, that is true. The Smokeless production in 1929 in the Southern West Virginia field, was approximately 56 million tons. Mr. McGarry estimated their capacity at approximately 75 million tons. The total production in the Appalachian area in the same period was 107 million tons. Mr. McGarry estimated a capacity to produce in that area, of approximately 169 million tons, or much greater excess capacity in high volatile coals than in low volatile coals, indicating that the Smokeless producers have better running time, that they can come nearer running their mines to something near their capacity, than the high volatile

mines. That is not only true in the Appalachian districts, but it is true in the other competitive districts.

By Mr. Donovan:

(558) In a territory where Smokeless may have a real or fancied advantage, we meet that advantage as follows: [fol. 479] As producers of Appalachian coals, we send in combustion engineers. We try to convince the consumer that he can use our coal more efficiently and economically, and in addition we try to lay the coal down at a price that is more attractive, considering the service to be performed, (559) And at a price which Smokeless will not meet. We are maintaining a position in the field by the delivered price which is the chief factor, and if we raise that price to such a point as would be attractive to users, Smokeless coal will come in. They will come in at any point where they find the price attractive and that is what makes competition. It is measuring the advantage whether alleged or real, by price. And this year Smokeless coal is giving us the keenest kind of competition at any time within my recollection. They are taking business at industrial plants that have for years used Appalachian coals.

We are meeting the same kind of competition with gas or water power. That is, that there are certain advantages that are urged on the part of those elements. In meeting that competition, if we cannot convince a manufacturer of power, a user of coal, that he can use coal more advantageously and at less cost than he can use gas or oil, then he goes to gas (560) or oil.

This year, I might say, we have lost some substantial contracts in the State of Michigan, due to the development of oil and gas fields in that State. And that is a new or at least a comparatively new development of the last two years in that State, and is business that we have had for 20 years, in the State of Michigan, that has gone to natural gas.

Our markets in the states of Alabama, Mississippi and Louisiana are almost negligible. Of the distribution of [fol. 480] coal in Alabama in 1929, less than 2 per cent went from the Appalachian fields.

Into Mississippi in that same year, less than a quarter of 1 per cent went from the Appalachian fields.

And into the State of Louisiana that same year, less than a quarter of 1 per cent went from the Appalachian fields.

(561) We are not the important competitive factor in those states. We meet a very substantial competition on the so-called Lake cargo coal. It varies from year to year. 1929 was a year of very high relative shipments to the Lakes. In that year approximately 39 million tons were shipped to the Lakes. Of that approximately 17 million tons, or 43.8 per cent, were shipped from the Southern high volatile fields. The rest of this coal came from the Smokeless fields of Southern West Virginia and Virginia, which supplied approximately 7 and a half million tons to this market. I have no distribution showing what percentage of shipments to the Lakes from the Appalachian territory come from the defendant companies and what percentage come from non-defendants, so that the figure of 17 million tons includes the shipments of defendant and non-defendant producers located in the Appalachian territory and it includes coal that comes from the district referred to as producing 107 million tons of coal. These are railroad statistics and we do not know what company shipped it or what the breakdown was. (562) It includes mines immediately touching upon Appalachian territory producing 12 million tons, and it includes captive coal and all coal. 7 and a half million tons came from the Southern low volatile fields of West Virginia and Virginia. The remainder [fol. 481] comes from Ohio, Northern and Central West Virginia, Western and Central Pennsylvania. In 1929 the Pennsylvania bituminous mines produced approximately 143 million tons of coal. In that year their productive capacity was approximately 190 million tons. In 1929 the state of Ohio produced approximately 24 million tons.

Again referring to Mr. McGarry's testimony, the productive capacity of these mines was approximately 42 million tons. In 1929 Northern West Virginia's production was approximately 31 and a quarter million tons. And their productive capacity was approximately 49 million tons.

(563) By Judge Northcott:

That includes all Northern West Virginia, including Fairmont and the Panhandle.

By Mr. Donovan:

If the Northern districts were furnishing the entire supply of high volatile coals to the Lake cargo trade, they could supply that and have a great deal of idle capacity left. With reference to the competitive basis on which coals from the Appalachian territory go into that market: Taking Ohio first, the Appalachian districts have a freight rate of 38 cents a ton more than Ohio, with the exception of Virginia, which is 53 cents a ton more than Ohio.

As to the Pittsburgh section, the Appalachian districts, with the exception of Virginia, have a freight rate more than (564) the Pittsburgh district of 35 cents a ton, and Virginia has a freight rate of 50 cents a ton more than the Pittsburgh district.

Now, there are two or three small districts in Western Pennsylvania that have lower rates, the Butler-Mercer dis- [fol. 482] trict, for example, than Pittsburgh, but they are not shippers of coal, and I do not have in mind a difference in rate there. The Southern fields have to go into these markets against a freight-rate handicap (565) ranging from 35 to 53 cents a ton.

By Judge Soper:

Q. And yet they sell nearly half of the coal?

A. They do.

Q. Any reason for that except those things that you have already told us?

A. In and during the war and in the emergencies following the war southern coal was zoned into that market. Each producer was required during certain periods to ship a certain percentage of their total production into that market. They made and established freight connections and increased their productive capacity. Since that time, especially in the situation that has existed since 1927, the matter has been one of competitive price in those markets. The summer time, of course, when lake cargo coal is moving, is the period of the least demand for coals, especially for coals for domestic purposes. The lake docks, especially on the west shore of Lake Michigan, and at the west shore of Lake Superior, and along the northern shore, take in large quantities of domestic coal during the summer time for distribution to Canada, Wisconsin, Minnesota and the

Dakotas, and it is an outlet again for the grades of coal for which we have no demand during the summer time when there is demand for the nut and slack coal for industrial purposes. And in order to keep the mines in operation the southern mines have met the competition to the extent they have retained their business. We have usually had since [fol. 483] the market (566) of 1927 to make a price of 35 cents a ton on our coals less than the coals from Pittsburgh. Now that does not apply to every sale or every grade.

Another factor has largely affected the movement of lake cargo coal and the percentages. Large industrial concerns having steel and by-product coke plants in connection with the steel industry on Lake Erie, Lake Huron, Lake Michigan and Lake Superior, with mines in our Appalachian districts, ship large quantities of coal to those plants during the season of open navigation because they can lay that coal down at their plants during that season by lake cheaper than they can all-rail, and many of them try to take in a great part of their year's supply during the season of open navigation. And that is one of the factors that goes to make up the large tonnage shipped from the southern mines to the lakes.

The United States Steel Company, the International Harvester Company, the Inland Steel Company and other companies with large plants in the Chicago district, in northeastern Illinois and northwestern Indiana, move large amounts of coal from our districts in that manner. They are included in these tonnages. The Ford Motor Company moves a large amount of coal to Detroit and to Duluth.

By Mr. Donovan:

They are captive mines, and are moving that coal and it is counted in the total tonnage moved from our district. We do not know how much tonnage of that there is, but we know that in the aggregate it is very large.

[fol. 484] (567) So that in the percentages that are recited as coming from the Appalachian district there must be included not only that which is shipped from the defendant companies but also that which comes from captive mines and from the non-defendant companies. That is true of the total also. That is, both the 39 million and the 17 million respectively each includes captive mine shipments—

includes the total shipments by all railroads reaching Lake Erie ports for shipment.

By Mr. Donovan:

I said that in the lake cargo shipments the northern districts could supply all the high volatile coal required and still have a surplus in their mines. That would be true of everything north of the Ohio and west of Buffalo. Approximately 75 per cent of the coals produced in the Appalachian region are distributed to points north and west of the Ohio River, (568) including lake cargo shipments.

The most important territories affecting competition in these districts, are the Lake district, which is referred to and the states of Ohio, Michigan, Indiana and Illinois are large consumers of Appalachian coal.

We meet in competition in the state of Ohio first the competition of the non-defendant producers in the Appalachian region. We meet the competition of the Ohio coal producer. We meet the competition of the Fairmont West Virginia panhandle and northern West Virginia. We meet the competition from the Pennsylvania high and low volatile areas. Also competition from the West Virginia low volatile area. Some competition—now slight—from Indiana, and the mines in Illinois have rates and are able to ship coal if the market demand justifies, to the state of Ohio.

[fol. 485] In 1929 Ohio itself produced approximately 24 million tons of coal (569) and according to Mr. McGarry its mines had a productive capacity of 42 million tons. In that year Ohio consumed approximately 46 million tons of coal; purchased from the Appalachian region approximately 16 million tons of coal. Ohio did not produce as much coal as it used. It used approximately 46 million tons and had a productive capacity of 42 million tons. It has produced as much as 45 million tons of coal.

There are established freight differentials to two of the areas in Ohio, and then to the Eastern area of Ohio there is no established differential. The rates differ very greatly. Referring to Defendants' Exhibit No. 9, the green area shown on that map, designated by No. 1, the coals from the Appalachian area reach that market on a freight rate 25 cents higher than the Ohio coals reach that same area, with the exception of Virginia and a small part of the Tennessee

area, but the bulk of the tonnage went in there at 25 cents over Ohio. In the area——

By Judge Soper:

Q. May I interrupt you a moment to ask you to give me some idea, if you please, of what that amounts to, relative to (570) the cost of the coal? For instance, there is 25 cents a ton more freight rate. What does the coal sell for?

A. At the mines?

Q. What does it cost the consumer in Ohio to buy a ton of Appalachian coal?

A. It varies with delivery points. Take Cincinnati as one of the nearest points. The freight rate is $1.79, plus a sur-charge of 6 cents, or a total of $1.85 today. There is no standard price for coal, but the price of coal to Cincinnati, on a mine-run basis—all coal is eventually figured back [fol. 486] to a mine-run basis—today, would not exceed $1 a ton, or a total cost to the consumer in carload lots of approximately $2.85.

In 1929, the average realization of the Island Creek Coal Company for all coal sold, which would be average for coal going to Cincinnati and elsewhere, was $1.43 a ton. The freight rate was $1.79 a ton, or a delivered price, in railroad cars, of $3.22 a ton. If an Ohio producer could get $3.22 for his coal, he would sell it for 25c more than we would. It would leave him $1.68 at the mines, as against our $1.43.

Now, referring again to Defendants' Exhibit No. 9, the yellow area marked "2," to that area Ohio has a freight rate of 50 cents a ton lower than the mines in the Appalachian region, in what is known as the Inner Crescent, which is the Appalachian region, with the exception of Virginia. Virginia has a rate from practically all its mines, of 25 cents a ton more than the rest of the Appalachian region to that particular territory.

To the area marked number 3 on the map, in Orange, I believe it is, covering from western Indiana to North Dakota, Ohio has a freight rate of 35 cents a ton less than the mines in the Appalachian territory in the inner crescent, except Virginia, and as to Virginia it is 60 cents under Virginia.

Now, in eastern, southeastern and northeastern Ohio, which is almost in an area very close to the Ohio coal fields,

and very close to the West Virginia panhandle and Fairmont and northern West Virginia fields, and the western Pennsylvania fields, there are no differentials, but there are wide differences in the rates, and they vary as much as $1 a ton, in some cases more, because as to deliveries right close to a mine, they may even be made on a shifting charge. As to that area there are so many different rates that you cannot give any reasonable—or I would say any picture of [fol. 487] them except that you might go to the details of each town.

By Mr. Donovan:

There are shipments by water to points all along the Ohio River from Pittsburgh, along the southern area of Ohio on the Ohio River, and all the way down to the Mississippi River. The Ohio River is now a canal with a permanent 9-foot stage, and coal moves on the Ohio River, and there are no published rates. The movement is by private carriers, and there is no basis for a comparison of their rates. Those rates are based on special contracts.

(573) In 1929 Cincinnati consumed approximately 3½ million tons of coal. Of this tonnage approximately half a million tons came from the low volatile fields of West Virginia—that is, the Smokeless fields, all-rail. The remainder was high volatile coal, and of the high volatile coal something over one-half was delivered to Cincinnati by river and the remainder of the coal was delivered by rail. A large part of it came from the Appalachian area—from both defendant and non-defendant companies.

Cincinnati is a highly competitive market. It is a close-by point, and the most of us maintain sales offices or sales agencies that distribute coal in that city. Competition there is very keen. (574) About half of the high volatile coal in that market is River coal; that is, in barges and unloaded and distributed in Cincinnati and the Cincinnati industrial district. The River coal is about one-half of the high volatile coal, something over 1½ million tons. Some of that coal moves by rail a part of the way. Coal from the Logan district moves to Huntington, West Virginia, and there is loaded in barges and shipped to *to* Cincinnati. [fol. 488] Coal from the Kanawha district is sometimes loaded direct in barges and sometimes with a short rail haul.

For a number of years a large amount of coal was delivered by river to Cincinnati from the Pittsburgh district. But the Pittsburgh producers of coal have not availed themselves of this market for the past several years. The Pittsburgh Coal Company retired from that market. They were the largest shippers of River coal, and they retired in 1918. They sold to our company their distributing facilities there, their river equipment used in that market, in 1918.

The mines in southern Ohio, Jackson, and Hocking and a number of districts—or I should say Jackson and Pomeroy districts, have a freight rate of 25 cents a ton lower than the rate from southern West Virginia.

(575) The Hocking district is a substantial producer of coal under normal conditions. I do not have the figures as to their production. I am speaking of the Jackson, Hocking and Pomeroy districts. I made the statement that those rates were 25 cents lower. I was in error as to those three districts. They range from $1.58 a ton to $1.76 a ton, from those three districts, as compared with a rate of $1.79 from the Appalachian territory except Virginia, and Virginia has a rate of $1.89.

(576) By Mr. O'Brian:

In 1930 the Jackson district produced 445,000 tons of coal. The Jackson district had a freight rate of $1.58.

The Hocking district produced 3,897,000 tons. Freight rate of $1.76. The Pomeroy district produced 593,000 tons, and shipped, and had a freight rate of $1.76. Those districts during 1930 had a large part of their productive capacity closed part of the year due to labor difficulties in the [fol. 489] district.

By Mr. Donovan:

I do not know what the production was in 1929 and I do not know the productive capacity, but I know that they are substantial districts, and have tremendous reserves of coal in the Hocking district.

The Number 8 district, the largest producing district in Ohio, in 1930 produced 16,589,000 tons of coal. The freight rate being $2.14 a ton. The Cambridge district produced approximately 2½ million tons, at the same rate, $2.14 a ton.

The Appalachian had a substantial advantage at Cincinnati as compared with the Number 8 and Cambridge districts. The Number 8 and Cambridge districts have a number of mines on the Ohio River, and they would be in a position, if they desired, to ship river coal.

[fol. 490] By Mr. Donovan:

The rates from the Smokeless fields of Virginia and West Virginia were $1.89 a ton.

By Judge Parker:

(578) Ten cents more to Cincinnati than the high volatile rates. And the same rate that Virginia has to that market.

By Mr. Donovan:

The rates from the Indiana fields to Cincinnati varied from $1.89 to $2.39. Cincinnati draws its main coal supply from the Appalachian region. And the Smokeless region. But it could draw a coal supply from a number of markets, both by rail and by river. A few freight rates are less than from the Appalachian region and others are greater.

By Mr. O'Brian:

Pomeroy, Hocking and Jackson are less. All other producing districts in Ohio have 35-cent freight differential in favor of the Appalachian territory. But from Fairmont and the Moundsville district, which is West Virginia panhandle and northern West Virginia, the rate is $1.89, or 10 cents more. Or the same as the (579) Virginia rate. And up until two or three years ago they had the same rate from the northern West Virginia districts as from the Appalachian regions.

By Judge Parker:

The northern West Virginia rate is now 10 cents in excess [fol. 491] of the Appalachian rate. Cincinnati gets a very small amount of coal from northern West Virginia and Pennsylvania. That is because Cincinnati might be considered a local market for our coals. And there are very close trade relationships between this district and Cincinnati. Cincinnati manufacturers and jobbers supply our

mines and our districts with a great deal of the supplies and merchandise that are bought and used in our coal fields. There is nothing to prevent coal being shipped into Cincinnati by barge from the Pennsylvania and northern West Virginia districts. Coal was shipped in there by barge since before the Civil War, and it was continued up until 1918, when our company bought the river facilities of the Pittsburgh Coal Company.

By Mr. Donovan:

The river rate is determined by contract (580) and usually the producing company owns its own transportation facilities. There is an advantage to the river in the city of Cincinnati where he can get his coal in the barges without too much rail haul to start with. Now many of these Pittsburgh mines load coal in barges direct from the mine and pay no freight rate, and coal is handled in barges in the Pittsburgh district all through the industrial district.

By Judge Parker:

The Ohio river is now a canal and conditions are much easier than they were in 1918. It is a 9-foot channel to Pittsburgh now and that was not completed until three or four years ago.

By Mr. Donovan:

Pittsburgh rates all-rail are materially higher than Fair- [fol. 492] mont. I do not know the reason for it, but it is a fact.

By Judge Parker:

(581) The Pittsburgh rate is $2.33 a ton. There is a difference of 54 cents a ton in favor of Appalachian rates.

(582) I think the coal can be handled from Pittsburgh to Cincinnati by barge, from mines leading coal directly from the mines into barges, for less than the $1.79 rate from the Appalachian district. It is like other water transportation. When coal is assembled in the barge, the extra distance is not an important factor. It is important, but

it is not a controlling factor, I might say. They can dump coal in the barges at numerous mines in the Pittsburgh district just as cheaply as they can place it in the railroad cars. I think, then, that notwithstanding the rail differential, the possibility of transportation by barge makes the Pittsburgh district a competing factor with the Appalachian field in the Cincinnati market and in all the markets bordering along the Ohio river. We pay 55 cents a ton to get our coal to Huntington, where we dump it in barges.

By Mr. Donovan:

We are 70 miles from the river, and we move the coal to Huntington all-rail, and place it in barges there and move it from there to Cincinnati. On the Kanawha River, a number of (583) mines load directly into the barges from the mines. They can load into railroad cars or into barges. The same thing is true in the Pittsburgh District, and in the West Virginia-Panhandle District. There are millions of tons of coal handled in barges in the Pittsburgh District for industrial plants.

Defendants' Exhibit 2, p. 37, shows the following:

Mr. O'Brian: In the year 1929, there were shipped into [fol. 493] Cincinnati, all-rail, from the Appalachian territory, 1,328,102 tons; from the Northern Fairmont, only 21,480 tons; from the Smokeless fields, 550,484 tons; from Western Pennsylvania, only 10,666 tons; and all districts of Ohio, 3,512 tons. The percentages of that total, distributed among the shipping fields, are; Appalachian territory shipped into Cincinnati, 69.38 per cent of the rail-coal going into Cincinnati. The Northern West Virginia and Fairmont fields shipped only 1.12 per cent; the Southern West Virginia Smokeless fields, 28.76 per cent; Western Pennsylvania, only .56 of 1 per cent; and all districts of Ohio, .18 of 1 per cent. This table on page 37 also shows the all-rail shipments for 1930 and 1931, which are not substantially different.

Judge Parker: That does not touch the river traffic.

Mr. O'Brian: No; it shows no river traffic—just the all-rail shipments.

Judge Parker: I wonder if this is not true, that the (584) coal that would come from the Northern West Virginia

districts and the Pittsburgh districts, would go by river rather than by rail?

Mr. O'Brian: Mr. Francis can tell us that. I do not know.

The Witness: No coal today is moving to Cincinnati from Pittsburgh and Northern West Virginia by river.

By Mr. Donovan:

As I stated a while ago, I do not think there is any coal—if there is, it has been a negligible quantity of coal—moved [fol. 494] to Cincinnati by water from the Pittsburgh-Northern West Virginia district since 1918. The Pittsburgh Coal Company for years delivered coal by river all the way to New Orleans, but in 1918 we bought their terminal facilities in Cincinnati and Louisville. We bought some of their steamers, and we bought some of their barges, and they retired from that business. They had at that time a home market taking their coal. They had been buying coal from our company for some time before we bought their facilities, to supply their river demand, because they did not want to ship it from their own mines.

By Judge Parker:

There is practically none moving by river from the Pittsburgh District farther down the river than the Wheeling District. Coal does move freely from the Pittsburgh District down to Wheeling, but they have not cultivated that market, and they (585) have not solicited that market since 1918.

By Mr. Donovan:

The Pittsburgh District had a so-called home market until 1924. They had a good deal of labor troubles, and shut-downs of mines to 1924 and up to and including 1927. Now, as Mr. Booth testified, they are back, attempting to re-establish themselves in the markets where they formerly sold coal, and he testified, in all territory north and west of the Ohio River.

By Judge Parker:

In my opinion, the City of Cincinnati could readily obtain all the fuel it desires from mines in Ohio and the Northern

West Virginia fields; and if there were an attractive market there, and the market was not already a highly competitive [fol. 495] market, a market where coal is generally sold at very low prices, it would attract coal there from these other regions, both by rail and by water.

(587) In 1929, 98.14 per cent of the total all-rail shipments to Cincinnati were from the Southern Appalachian and Smokeless fields.

By Mr. Donovan:

I do not know how much of that comes from defendant and how much from non-defendant mines, and so far as I know there is no way of ascertaining that information. Both defendant and non-defendant mines in the Appalachian territory ship into that territory.

That is a matter of general knowledge. For example, of this river coal from the Kanawha District, one of the largest shippers, I mean of river coal, is the Hatfield-Reliance Coal Company. We asked Mr. Hatfield, who I be- [fol. 496] lieve is the chairman of the board and not the president of the company, if he would not employ Appalachian Coals, Incorporated, to sell his coal. He gave the matter consideration, and he has, I might say, a very substantial production in the Kanawha District and in the Hazard Districts; and he finally told us, "No, I have my river facilities, and my river business to Cincinnati, Covington, and Newport, and I distribute a great deal of coal there, and I have a little different situation from the shippers of Appalachian coal generally. And I think I would be better off to remain outside, on account especially of the fact that I do handle river coal out of the Kanawha River, down the Ohio River to Portsmouth, Cincinnati, Covington, Newport, and other distributing points along the river." There are other river mines along the Kanawha River that do ship coal direct into Cincinnati who are not defendant (588) producers in this district.

There are two natural gas pipe lines entering Cincinnati, and natural gas is a very active competitor for business in Cincinnati as against coal. The Island Creek Coal Company has a retail department in Cincinnati. That is the only city where we retail coal through a subsidiary, and we find that the competition with natural gas is very

keen in Cincinnati industrially and for domestic use. We find the same condition in relation to fuel oil.

Fuel oil comes into Cincinnati by pipe line, and is also delivered in Cincinnati by rail, and is a keen competitor with coal in that market. Coke also is a keen competitor in that market, and not only coke made from coal, but coke made from petroleum products. There is a large refinery just at the west end of Cincinnati that makes petroleum coke. It used to be considered a waste product, but is one of the finest, has been ascertained in the last [fol. 497] few years to be one of the finest cokes made, a very satisfactory domestic fuel. We meet petroleum coke in competition with coal constantly in Cincinnati. (589) The territory just north of the Cincinnati markets, the Miami Valley territory is somewhat similar to Cincinnati with reference to such competition. That is territory going up to Hamilton, Middletown, and the towns just north of Cincinnati, within a range of 40 or 50 miles.

The difference in this market is that river coal cannot be delivered in barges in that territory. It has to be reloaded at Cincinnati in railroad cars, and trans-shipped to the point of consumption. There are four large companies that have elevators, and that are prepared to take coal from barges at Cincinnati and trans-ship it by rail into the territory in Southwestern Ohio and Southeastern Indiana, up to points around Indianapolis. That is called x-river coal in railroad terminology, and there is quite a volume of river coal arriving at Cincinnati which is trans-shipped into that territory, on different rates.

Freight rates to the Miami Valley are shown on Defendants' Exhibit No. 3, at page 17. That district is grouped by destinations. It is a freight rate grouping. (590) It includes a number of towns and cities, I believe the largest of which are Hamilton and Middletown, but it is a fairly large industrial territory and is an important market.

The rate from the Appalachian territory to this district, except Virginia, is $2.02 per ton. From the Virginia dis- [fol. 498] trict it is $2.17 a ton. From southern West Virginia and Maryland low volatile districts the rates are $2.12 a ton. From northern West Virginia, including Fairmont and Moundsville——

Generally the smokeless districts on the Norfolk & Western Railroad are spoken of as the Pocohontas district. The

low volatile districts of the C. & O. and the Virginian Railroads are spoken of as the New River District, although technically the smokeless district on the Virginian Railroad is known as the Winding Gulf district. But in the trade it is known as the New River district.

Northern West Virginia has a rate of $2.02, which is the same rate as Appalachian district with the exception (591) of Virginia.

The rates from the Ohio district to this territory range from $1.60 from the Jackson district to $2.14 from the Coshocton district. The largest producing districts being the Hocking with $1.76, and the Number 8 and Cambridge districts with $2.08.

By Mr. Donovan:

The reason why these Ohio districts, certain of which are considerably lower in freight rates than the freight rates from the Appalachian territory, ship so little coal into that valley in comparison with our districts is that for a number of years producers in the Appalachian district shipped into this territory a cleaner and better pre- [fol. 499] pared coal than was shipped from the Ohio districts. The Ohio was an older field. According to my recollection the development of the Ohio district began in 1840.

The older fields, in the Kanawha and the Jellicoe-Middlesburg, about 1870, although there might have been some production in the Middlesburg-Jellicoe prior to that date. That is as rail shippers. There was production in the Kanawha district prior to the Civil War on the Kanawha River just as there was in the Pittsburgh district. And barges were taken down the river when there wasn't any regular (592) stage, during the high water periods, and held at Cincinnati for summer use. But the coals generally were screened, cleaned and prepared for the markets better in the Appalachian districts at an earlier date than in the Ohio districts. The Ohio districts have made material progress with their modern equipment in the screening and sizing and preparation of their coals within the last six or seven years, and are producing and shipping much better coal today than they were prior to that date. Shipment figures indicate that Ohio is practically not selling in that field at all.

By Mr. O'Brian:

I will read the figures for the 1929 shipments into this area shown on page 61 of Defendants' Exhibit No. 2.

(593) Appalachian territory, 1,703,869 tons.

Northern West Virginia-Fairmont, 1,743 tons.

Southern West Virginia, Virginia and Maryland, low volatile, 140,549 tons.

Western Pennsylvania, 633 tons.

Ohio—all districts in Ohio, 5,624 tons.

[fol. 500] The percentages were, Appalachian 91.98; northern West Virginia-Fairmont .09; southern West Virginia, Virginia and Maryland, 7.59; western Pennsylvania .04; and Ohio, .30.

I do not know the prices being made in that territory by the Ohio producers. We have been well intrenched in that market for a number of years. And for the past several years it has been the general practice of the coal producer having a customer to meet almost any competition offered to retain his business. And it has been a buyer's (594) market, declining prices, and it has been difficult for us to get business that another producer has had or another district has had during the last five years.

This is an average field of consumption. I do not believe it is at all different from the general consumption territory in the state of Ohio or Indiana and Michigan. The coal is used for the same general purposes. Some of it is used for by-product, and Ohio coal is not used for by-product. The only by-product plant I remember in this territory is one at Hamilton, Ohio, that belongs to the Koppers company, who own their own mines and ship their own coal to their ovens.

[fol. 501] (614) JAMES D. FRANCIS, heretofore called as a witness on behalf of Defendants, was recalled and testified further as follows:

Direct examination resumed:

Mr. O'Brian: May it please the court, referring to the exhibits Mr. Francis put in this morning, 10, 11, 12 and 13, which purported to show the value of the different fuels sent into those Southeastern States, you will remember,

the court asked the question whether the bituminous coal item included bituminous coal which was used or might have been used in manufacturing electrical energy. Mr. Francis said he thought they were in there; that he had taken the Census figures. I sent a telegram to the Bureau of Mines asking that question, that is whether the bituminous coal item of 754 million tons included or excluded [fol. 502] coal used in manufacturing purchased electrical energy, at a cost of $475,000,000. In reply I am advised that the bituminous coal as shown in those Census figures does not include the cost of fuel used in the generation of purchased electrical energy. I assume there will be no dispute about that. These exhibits, you see, would be misleading as they have gone in, in the absence of that explanation.

(615) The Witness: I thought they were in there. I am glad to have the information. I really think it is helpful to show the facts.

(616) With reference to the question whether the small miner can produce coal cheaper than the big one: There is no uniform rule, but generally he can. I think that generally the small producer, as far as production is concerned, without very much overhead, with the small capital investment, and the way he usually acquires his property, can produce more cheaply. In his case, it is a one-man job. As a rule, he is the manager, superintendent, and the president of the company. Another item enters into that that is very vital. The small producer, as a rule, pays a much less wage scale than the substantial producer, and that is where he gets the advantage, if at all, in the lower wage scale. In our district, the lowest wage scales are paid by the smallest producers, and sometimes—and today—some of the small producers in our district are not paying more than 60 per cent as much wages as the substantial producers. That of itself, wages being a very large part, gives him a tremendous advantage.

(617) It is true as a rule that the small mine can produce more cheaply than the large mine. He does not have some of the advantages of the large mine. *He does not have some of the advantages of the large mine.* He is usually not as well equipped to clean and prepare and to size, and to grade.

By Mr. Donovan:

His selling is generally more inefficiently handled; so, from a production standpoint, he can get out one or two [fol. 503] sizes of coal cheaper than the substantial producer, but it usually is not as good coal. It is usually not as clean, or as well prepared, and it does not usually fit the needs of the trade, and he has an offsetting handicap as a result of that.

By Judge Northcott:

There are no larger operations in West Virginia than those of my company. We have an enormous tonnage over which to spread our overhead. We have a large overhead, but it is borne by greater tonnage. I think there are producers in West Virginia who produce coal cheaper than my company. (618) I think some of the very small operators can. I mean companies producing two or three or four hundred tons a day. When an organization gets up to the point of producing a thousand or two thousand tons a day, and does have an organization—these small producers do not have this organization. They are just one-man propositions, or family propositions. They sometimes do not have any salaries or any overhead, in the ordinary sense. A great many of the small mines have taken over the properties of companies that have failed. They have no investment in properties. They have, therefore, no depreciation charge. They have a royalty charge. Sometimes they buy the land. In that manner, they do not have that overhead that we have to spread over, or scarcely at all.

By Mr. Donovan:

I am speaking of mines producing from 200 to 400 tons a day. After you get above that size, then size counts in cost, and the more tonnage, the more you have to spread your overhead over, and, in the case of the substantial producers, the substantial tonnage they have cuts the overhead rapidly.

[fol. 504] By Judge Northcott:

Q. I know that in the struggle for existence that, as we all know, has been going on in the coal business, as well as

in every other business of the country in the last year or two, the little fellow has gone to the wall, whereas the big fellow has kept his head above water.

(619) If he is producing cheaper than the big fellow, and can sell cheaper, I do not see why that should be the case.

A. In the Logan District, we are the largest producer, and we have a very substantial investment. We have a depreciation charge and a depletion charge. The next largest producer has normally about half the tonnage that we have. Before that company went through a receivership, where it was sold on default of bonds, having $10,000,000 of bonds, and approximately $20,000,000 of preferred and common stock, that company, with half the tonnage, had a much greater overhead per ton than we had.

Q. That may have been because it was over-capitalized or over-loaded.

A. But when that company was sold, at a trustee's sale, and brought substantially $1,000,000 at the sale, and then was reorganized, its overhead was substantially reduced. Its overhead, so far as depreciation and depletion are concerned, was reduced. They still have the royalty, and they still have their organization expense. Our organization expense, management and sales expense per ton, is probably less than theirs. I do not know what it is, but it is probably on account of the higher tonnage, and that is usually the rule. But they are all affected by these various conditions. When you get substantial companies, capitalized in a normal way, producing substantial amounts of [fol. 505] coal, it is true that in those companies, the companies having the higher tonnage, spreading the overhead around, are in a better position, and do spread the overhead, and have a less cost. But those companies are also better equipped to prepare the coal, and to market the coal, and (620) that is where they have the advantage over the small company that has poor preparation, and no substantial sales outlets. That factor alone is sufficient to cause the closing down of a large number of those companies, and there have been wiped out a large number of companies in these regions, large and small.

(621) On the Chesapeake & Ohio Railroad in 1923 they had substantially 720 active operating mines. They today have slightly more than 300 active operating mines, on their active list.

Now, of course mines that are closed down you are entirely correct in saying that the most of them were small mines, a great number of them were little mines; but they were closed down partially because they had gone into thin, dirty seams, with bad roof conditions. When there was a full supply of coal, their coals were not acceptable in the trade. They were dirty and impure and higher in ash.

That, of itself, together with their lack of sales outlets, and lack of connections and inability to make substantial contracts, and that is a very important matter, because the small company isn't as favorably situated as a large company when it comes to bidding on substantial pieces of business, and the small company's tonnage isn't given consideration by a great many buyers for the reason that they do not want to mix their coals, or get it from too many sources of supply.

Q. But they will buy that coal if there is a great demand and a corresponding scarcity, I suppose? That is, that is [fol. 506] when a small operator comes into the market?

A. Yes. And some of them stay in the market from year to year. Some of them have good coal. Some of them have as good coal as the larger mines, and are as efficiently operated, and employ competent sales companies.

Q. What tonnage in your opinion puts a mine out of that class that you have described?

A. It is hard to draw the line. A mine with 100,000 (622) tons a year is beginning to get to be a substantial mine. A mine under 100,000 tons a year is a small operator.

Q. That meets the description that you have been making, something under 100,000 tons a year?

A. Yes. But somebody else might say 150,000 tons a year.

Q. But approximately 100,000 tons a year?

A. Yes, sir.

By Mr. Donovan:

I have prepared for the purpose of showing the movement of tonnage to the state and city named from the coal producing districts supplying them and the freight rates from each of the districts of origin to the point of destination, and typical situations in Indiana and Michigan.

(623) Whereupon the statement showing the movement of tonnage to the state and city named from the coal producing districts supplying them and the freight rates from each of the districts of origin to the point of destination in the states of Ohio, Indiana and Michigan was offered and received in evidence and marked "Defendant's Exhibit No. 14". These figures are based on Defendants' [fol. 507] exhibits No. 2 and No. 3.

The first page of that exhibit is Ohio as a whole. I had this exhibit made up over last night and this morning in order to try to save a little time in the giving of verbal testimony. The top line, or the top column above the line in the case of Ohio, gives the tonnage by years from the districts named, and shows the tonnage that the Appalachian district sent into Ohio, and the tonnage of the Fairmont district, and of West Virginia and Maryland low volatile districts, and the Pennsylvania districts, and the Ohio districts.

(624) The only purpose of this exhibit is to show quickly and graphically the shifting tonnage between districts from year to year in this way. This table does not include the states of Michigan and Indiana but cities in Michigan and Indiana. For example, it shows Detroit and Flint in Michigan, and South Bend in Indiana. It shows the rate from the producing districts to those markets, the tonnage going into the markets from the various producing districts is shown on the exhibit, and the percentage of the total. The figures in these exhibits were taken by our statistician. I personally have not checked them, but I will explain that they were made up just like the other exhibits that we have filed here.

(625) In 1929 the state of Michigan received all-rail 20,007,808 tons of coal. Of this amount 14,522,291 tons came from the southern high volatile fields in the Appalachian region. Almost 4 million tons came from the southern low volatile fields in West Virginia and Virginia. The remainder came from scattering territory in Ohio, Northern West Virginia and western Pennsylvania, and a little tonnage possibly came from Indiana, but a very small amount. This coal went into this market from the southern Appalachian field on a freight rate handicap of 50 cents a ton over coals produced in the state of Ohio. That is, pro-

[fol. 508] ducers of coal in the state of Ohio have a freight rate advantage over this market. Producers generally in western Pennsylvania, northern West Virginia including Fairmont and panhandle, have identically the same rate to all these markets. There are varying rates and they are not a differential as related to these markets, to Indiana and Illinois. There is no differential relationship. It is known in railroad terminology as difference rather than as differential.

(626) Pittsburgh districts get into Michigan at the same rate as the Appalachian district. That is also true of Fairmont. Indiana gets in there at varying freight rates from varying districts. Illinois has freight rates to points in Michigan. I don't know whether they actually ship coal there.

Referring to Defendants' Exhibit 3, page 28, it shows Kalamazoo is a point something in the southern central portion of the state. The rate from the Appalachian district, except Virginia, is $3.10 a ton. The rate from the Virginia district, $3.35 a ton. The rate from the Smokeless districts and Maryland, $3.35. Northern West Virginia and Pittsburgh, Connellsville and the Freeport districts in Pennsylvania, $3.10.

The freight rate from most of the Ohio district is $2.60, or 50 cents under the rate from the Appalachian field. But there are four districts in Ohio that have rates one of (627) $2.39 and three of $2.50, which gives them 60 cents.

Now as to Illinois. Illinois has rates to Kalamazoo varying from $2.02 as the low to $2.72 as the high. And the rates from Illinois to this market are substantially less—and the lowest district there $1.08 a ton less to Kalamazoo than from our district. From the highest rated district in Illinois they are 28 cents less than the rates from the southern [fol. 509] Appalachian districts.

Western Kentucky has a rate of $3.07 a ton, or three cents a ton less than the rate from the bulk of the Appalachian region.

In the southern peninsula of Michigan the rates vary but generally speaking the principal producing districts in Ohio to all the southern peninsula of Michigan, in the yellow color there, number (2) on the map, Defendants' Exhibit No. 9, are 50 cents lower than the $3.10 rate from the Appalachian region.

By Judge Parker:

For certain purposes coals that are produced from Ohio and Illinois are just as available for use in Michigan as the great bulk of the coal from the Appalachian region. Now they are used for domestic (628) purposes and they are used for steam purposes. Now they are largely confined to that use. But the bulk of the coal used in the state of Michigan is used for domestic and steam purposes.

There is a difference in the chemical content of those coals. Some Ohio coals are just as low in ash as the coals in West Virginia. We have got a very large amount of coal in the Appalachian region that is just as high in ash as the highest coal in the Ohio field. Generally the Ohio coals are higher in sulphur content than the coals from the Appalachian region. But we have coals in the Appalachian region with just as high sulphur content as the coals in Ohio.

By Judge Soper:

There is a very small amount relatively of Ohio coal sold in Michigan. I don't think it is the quality of the coal that has kept Ohio coals out of this market.

[fol. 510] By Mr. Donovan:

Ohio coals were in there originally, and Pittsburgh coals, Fairmont coals were in there years ahead of these coals. But as far as Ohio is concerned, in 1913 and 1914 the mines in Ohio had a strike that lasted sixteen months, and Michigan had to get coal from some place in that time (629). And they came to our markets, or we went to them with our coals. During the war they had a local demand for their coal. We have no local demand. We have to go out and hunt for all of our business. Pittsburgh had large tonnages in there at one time. But they found a local demand for their coal that was more desirable than Michigan. And they furnished that local demand, and I might say frankly neglected the Michigan market. And we got in there.

By Judge Parker:

Q. In my reading of the Government's bill I ran across some statement that in certain sections this Appalachian coal was the only coal that was available for the iron and

steel industry. Now I would like to see what those sections are, and whether there is anything in that competition. Whether or not there is substantial competition there from other sections of the country.

(630) A. In regard to that, Judge, as a rule the iron and steel industry does use steam coal, and where they use steam coal they can use Ohio coal; but for steel-making and by-product coke-making purposes, to have coke for smelters, they do not use Ohio coals, but they do have available, on equal freight rates with the Southern Appalachian field, large producing areas in Western Pennsylvania and Northern West Virginia. As testified by Mr. Booth yesterday, they have coals available in Northern West Virginia and [fol. 511] Western Pennsylvania carrying the same freight rate to these markets that we have, and that are interchangeable for iron and steel making purposes, by-product coke-making purposes, and, in fact, every purpose for which coal from our district can be used.

Q. Do they have it in sufficient quantities to meet the demand up there, and furnish substantial competition?

A. They have it in sufficient quantity to meet the demand.

By Mr. Donovan:

The only way we have held that market is by repeated price reductions on our coal.

By Judge Soper:

Q. I think you said that the amount of coal which Ohio (631) was sending into the Peninsula was comparatively small.

A. Out of the total——

Q. Excuse me, please. They only point I had in mind was to see whether there was any further explanation of it. The impression that makes on my mind is that under present circumstances Ohio coal is not a very efficient competitor with Appalachian coal in that territory, and I have not been able to understand why, if it is available, and if it is nearer, they do not sell more coal there against your coal.

A. Our coal will average, as compared with Ohio, a greater number of heat units per pound than Ohio coal. It will average lower in sulphur and ash content.

[fol. 512] Q. In other words, your coal is better coal for the Peninsula than Ohio coal?

A. For steam purposes, it is better up to a certain price. Each consumer of size has a formula, so that he can figure just how much difference there ought to be in the delivered price, including the freight rate, between the two coals.

Q. If they cannot compete with you now, how do you figure that the formation of this organization is going to enable them to compete in the future?

A. We hope they will not compete any more successfully in the future.

Q. Then, is it not rather off the point to be urging upon the court this vast amount of coal in Ohio as a probable competitor for the Michigan territory?

A. No, because it is available, and it takes very little difference between the two to swing the business (632) from one coal to another.

By Mr. Donovan:

The difference between the coals is a difference in the delivered price, so far as steam coal is concerned, and in the event that our price should be raised through the formation of Appalachian Coals, Inc., Ohio coal would then go in, to a great part of the steam-producing area.

There is another factor. There are some plants that are built for high-fusing coal, that is, coal where the ash will not melt below 2700 or 2800 degrees Fahrenheit. A very few Ohio coals will meet that test in those boilers. Those boilers are not in the majority, but there are coals in Western Pennsylvania, and in the Fairmont region—that will meet those tests. In other words there are two kinds of coal that can be used there. One is for steam purposes, and the other for the special purposes which I have described.

[fol. 513] For steam purposes, in certain types of equipment Ohio coal would meet our coal at a price. (633) In the types of equipment in which they cannot use our coal, they can get coals from Western Pennsylvania and Northern West Virginia that will fill their requirements. The West Virginia and Western Pennsylvania districts are actively in competition with us there now and we are attempting to hold that field against them.

Michigan has a coal field. It is not a high-grade field, but it is this dark-hatched area in the Northeastern part of the State indicated on Defendants' Exhibit 9. They have produced as much as 1,000,000 tons, or a little more than 1,000,000 tons a year. It is used locally for steam purposes.

The statement I made in regard to Ohio that one reason we were able to go into that Ohio field successfully, was because of the better preparation and cleaning of our coal is true as to Michigan.

(634) Ohio and Western Pennsylvania are now introducing modern equipment for cleaning and preparing their coals for the market. And that cleaning makes coals available for purposes for which they were not available before they were properly cleaned. It increases the fusing point of the ash. It lowers the ash itself and decreases the sulphur content.

The competitive situation in the State of Indiana is very similar to that in the State of Ohio. Except in the variation in the freight rates to the various markets, there is not a great variation in the competitive situation in the two States. Indiana, like Ohio, has its local coal fields, and they produce a substantial amount of coal. In 1929, they consumed 15,553,339 tons of coal, outside of what is known as the Chicago Industrial District, where the figures are at least on the general consumption in the States of both Indiana and Illinois. It produced in that year slightly more [fol. 514] than 18 million tons of coal. The consumption, of course, in that Chicago District, is a large consumption—as I recall, approximately 32 million tons. Coals from non-defendant companies in the Appalachian territory go into Indiana and into Michigan, the same as into the other territories. Especially into the eastern half of Indiana. They go in in very substantial quantities, and they have a very high percentage of the consumption in certain towns and cities in the eastern half of Indiana. But to the territory colored in yellow indicated on Defendant's Exhibit 9, the Pittsburgh-Fairmont region goes in there on identically the same freight rates that we go in there.

(635) The distribution in the Chicago District was 32,500,000 tons. The all-rail shipments from the Appalachian

region into the Chicago District were approximately 7 and a half million tons. (636) But a substantial amount of that was captive coal going from the steel companies' mines to the steel companies' plants. There are certain steel companies located there which have mines of their own. In the Harlan District, the largest producer in the district is the United States Steel Company. They shipped into the Chicago District a very substantial amount of coal. I won't give the figures, because they are not a matter of public record. They were furnished to us by the Steel Company. But the Inland Steel Company also has mines on the Chesapeake and Ohio, and ships substantial amounts of coal to their plant. The Wisconsin Steel Company, and the Interlake Iron Company, are all large consumers of coal, owning their own coal properties.

All our coals meet with competition of the other Appalachian producers and coals from other competing fields in the Chicago District. We meet more Indiana and Illinois coal in the Chicago District than we meet from the other regions. Smokeless coal also goes in there in substantial [fol. 515] amounts. But the freight rates from Indiana and Illinois to the Chicago territory gives them an advantage. Altogether, we have shipped into the Chicago District from the Appalachian (637) region, about 23 per cent. And in that 23 per cent is included both the defendant and non-defendant companies in the Appalachian region and the captive mines as well. I included captive mines, and non-defendant companies. Out of 32 million tons, as shown on Defendants' Exhibit 2, page 107, is shown the territory shipping coal into the Chicago District. The districts shipping the two largest amounts were first, the Smokeless low volatile districts in West Virginia. That is affected largely by the fact that the United States Steel Company has a very large production in the low volatile districts in McFallow County West Virginia. And the Illinois districts shipped 10,092,000 tons. Western Kentucky shipped 1,168,000 tons. Ohio only shipped 29,000 tons. Northern West Virginia and Fairmont shipped 67,000 tons, and the Appalachian territory shipped the remainder of the tonnage. We have no figures that will show the coal actually shipped from the Appalachian territory by the iron and steel industries and how much of that coal comes from captive mines.

But the Youngstown Sheet & Tube Company have large mines in the Pittsburgh (638) district, and they also have mines in the Appalachian district. Their holdings in the Pittsburgh district are much larger. The United States Steel Corporation have large mines in both producing districts. The steel company uses both coals. They have a freight rate advantage on their coals, by Lake, and they take a great deal of the coal to the Chicago district by Lake from the Pittsburgh-Fairmont district. But we have no breakdown of those figures.

[fol. 516] By Judge Parker:

No such figures are available. There are no figures compiled or published, according to my knowledge.

By Mr. Donovan:

Practically all these figures that we are using came from two sources, possibly three sources: the figures compiled by the Bureau of Mines, Department of Commerce; the figures compiled by State reports; and figures compiled by railroads. And they do not attempt to compile those figures as to individual users. That is more or less considered trade secrets and information, and producers and consumers are both hesitant about giving out their source of supply for public information.

In 1931 the production from captive mines in Appalachian territory was (639) approximately 16 million, plus, as I remember it. Of course, as to coke, in the matter of steel production, that goes directly for smelting purposes after the coal is made into coke. The only figures that we have showing the proportion of tonnage that goes into the Chicago area for the iron and steel coke industries, were secured in this way: Mr. Howe, the Secretary of Appalachian Coals, Incorporated, wrote letters to the Inland Steel Corporation, Wheeling Steel Corporation, Interlake Iron Company, and the United States Steel Corporation, and also to the Youngstown Sheet & Tube Company, and asked them if they would give us their figures for that territory, that we would like to know.

The Youngstown Company responded, and said that it was confidential information, and they could not give it out. The other four companies answered and gave the figures re-

quested for 1929. And they shipped, in the aggregate, 3,747,725 tons from their captive mines to their own plant. [fol. 517] (641) I have now made the calculation as to the division of the production of 16 million or over tons of production of the captive mines in the Appalachian region. Of that amount 2,168,000 is railroad mine coal used by them for fuel purposes, leaving the captive tonnage in the Appalachian territory at 14,200,000 tons. Of that 14,200,000 tons approximately 200,000 is mined by the state of Tennessee, and I understand used by the state in their public institutions. Leaving 14,000,000 tons of captive tonnage in the hands of the commercial consumers. I do not have the exact amount and cannot ascertain it quickly—the amount going to tidewater of that tonnage. There is a total from all of our districts going to tidewater of about 4½ million tons. And something less than 2 million tons of that would be captive tonnage of the Koppers company going to tidewater for the use of their by-product ovens in the neighborhood of Philadelphia and New York. Leaving approximately 12 million tons from captive companies going to points of consumption north and west of the Ohio River. This is used for iron and steel purposes. The only part of that tonnage that is consumed south of the river is some coke made at Ashland, Kentucky. So out of 16 million tons of the captive mines it would be safe to say that nearly 75 per cent goes into that area for iron and steel purposes. Now some of those captive mines sell a certain amount of (642) their coal. None of them sell a large amount of their coal in competitive markets, but it is all coal that is suitable for that purpose, and it goes into that market for use largely in gas-making and by-product plants and for steel making and foundry purposes.

By Judge Parker:

A considerable amount of that coal is included in the Lake Cargo tonnage. For example, the Cannelton Coal & Coke [fol. 518] Company has a production of 727,000 tons. Those mines are affiliated with the Algoma Steel Company in Algoma, Canada. And they send during the period of lake navigation a subtsantial part of their production to their own plants when their plants are operating.

By Mr. Donovan:

The production of the four companies I referred to in the Chicago territory is approximately 4 million tons of high volatile coal in these districts in 1929. There is one utility company that has a few hundred thousand tons of coal; that they may use part of it for steam and the balance for gas-making purposes. There is no way to divide it. Those companies are Wisconsin Steel Company, the United States Coal & Coke Company, the Inland Steel Company, and the tonnage (643) going to Chicago to the Interlake Iron Company is from the Kingston Pocahontas Coal Company, as I understand it. Now there is another captive company there, a large one, that may interchange the coal—use a large amount of the coke—it is the Ford Motor Company. They have this captive tonnage, about 2,700,000 tons. And they buy in addition substantial amounts of coal. But all of their coal they mine is coal that is suitable for steel and by-products and gas-making purposes.

With reference to the remaining territory north of the Ohio River, which is generally the territory numbered (3) in orange on Defendants' Exhibit No. 9: The Appalachian coal goes into that territory in competition with the same coals that it competes with in the state of Michigan. And the tonnages shown on the map, Defendants' Exhibit 9, [fol. 519] give the all-rail tonnages going into that market. Those tonnages go into that market on the same freight rate as the Pittsburgh-Fairmont region. In addition there are substantial tonnages from the Appalachian region going to those markets by lakes, and it is distributed from docks along the west shore of Lake Michigan and from Lake Superior. We have no means of knowing after the coal goes into the vessels along Lake Erie how much is distributed to any state. But it goes there, is placed in the docks along with coal from the other producing fields shipping to Lake Erie, and is distributed by the docks. And we do not have any statistics as to where it goes, or the quantities.

(644) There is a coal production in the state of Iowa and the state of Missouri, and there is used a substantial amount of lignite coal in North and South Dakota, and that is shipped down into Minnesota as far as Minneapolis and St. Paul.

By Judge Parker:

The figures reflected on that exhibit as to Appalachian coal in Minnesota and Iowa are all-rail figures and do not include any of the Lake coal because there are no such statistics available as far as I know.

By Mr. Donovan:

In the organization of Appalachian Coals, Incorporated, we provided for a president and a number of vice-presidents. The number of vice-presidents has not been decided upon. The fields of activities and duties of the president and vice-presidents would be those usual to the officers of any company engaged in selling and merchandising coal. The president of the company would be the chief executive. [fol. 520] (645) It was agreed, at the meeting of the board of directors, that the board and the executive committee would attempt to find the best qualified man possible to take the position of full-time president of this organization —a man who had no connection with any producing company in this territory, and who would be free from connections with the producers.

The chief activity of the company, of course, would be the sale and merchandising of coal produced by the companies. The plan of the board of directors contemplates dividing the *the* company into departments as follows: A department to study the marketing and distribution of coals; to keep in constant touch with the markets as to their market demands; have statistics as to the consumption in the consuming markets; and the kinds and grades of coal made, and available for shipment by each producer. It was planned that we would have a vice-president in charge of these departments.

It was and is the plan of the company that we would keep as complete a statistical organization as possible, on the (646) movement of coal, the demand for coal, and the character of coal needed by the consumers; and in that connection, that we would maintain an inspection and engineering department to keep in constant contact with consumers buying coal through this agency, and contacting with other consumers that we hope to make customers of this agency.

For the purpose of demonstrating the advantages of our coals, their suitability, and their advantages over other coals.

We feel that the lack of advertising is one of the things that has lost the coal industry a substantial volume of coal [fol. 521] to competing fuels. Most of us do a certain amount of advertising, but we generally feel that it is lost in the mass of general advertising matter. The cost of advertising in magazines and daily papers runs into very large amounts, and it was felt by the stockholders and directors of this company that we should put on an expensive advertising campaign for Appalachian Coals, showing the desirability of using coal as a fuel, and Appalachian coals over all other coals, pointing out the merits and advantages of Appalachian coals.

It would be the purpose to establish a credit department. With these various sub-agents appointed by the operators and employed by Appalachian Coals, Inc., in distributing (647) a large amount of coal, it is expected that all credit information would be assembled, and that each sub-agent or distributor of Appalachian Coals, Inc., would be able to get the credit experience of any sub-agent selling such consumers, and that that would give a very good indication in the markets as to the reliability of the purchasers.

With reference to the question how the price at which Appalachian Coals, Incorporated, sells the coal it handles will be arrived at: We had numerous discussions about that matter in our meetings and in our board of directors. We decided that the proper method of arriving at the price of the coal, would be to keep a staff of vice-presidents, part of them in the central office all the time, rotating two or three of them out each week into the principal consuming markets —assuming we would have a central office in Cincinnati, that they would go to Chicago, Detroit, New York, Pittsburgh, and other consuming centers, to get as much data as they could in regard to the markets and the competitive conditions, and that they would relay that information [fol. 522] daily to the Cincinnati office; that they would get from the sub-agents the greatest possible amount of information as to what competitive coals were being offered at in the market, and for each size, kind, grade and quality of coal, that the price would have to be arrived at by this group of vice-presidents in the central office, in conjunction

with the president, when he was available, realizing that he would have to be away a great deal, and that the real responsibility would come on this group of sales vice-presidents, and that they would make the price in accordance with the competitive (648) prices in the consuming markets, and what, in their opinion, other producers would be willing to sell coal for in such markets.

That would be true in both spot sales and contract sales, with the restriction that on a contract sale, where the contract ran for a period of more than 60 days, the selling agency would have to confer with the operator, to see whether or not he desired to accept the business on the suggested price. If he did not, he would have the right to reject the business, and to refuse to allow the agency to make the price, if it ran for a greater period.

By Judge Parker:

Q. Let me ask right here about this fixing of prices. I do not exactly understand, What would occur in a situation of this sort; Suppose you fixed a price delivered on coal at a certain point, say, at $5 a ton, and a man comes along and says he wants 100,000 tons, and he would take it if you would sell it for $4.75. Does your plan contemplate that the manager could accept that bid of $4.75 for 100,000 tons, or must he stick by the price as fixed by the vice-presidents, and the president?

[fol. 523] (649) A. It is contemplated that if a suggested price is made by the vice-presidents to the salesmen or sales agents, that they can ask for a modification of price, and recommend it, and that it can be acted on and changed without any notice whatever. Somebody has to have the responsibility of saying the price at which you will sell each size and grade and quality of coal.

Q. That is what I am getting at. It is used only as an illustration, but what I have in mind is this: A board of vice-presidents and the president, fix the price, from which you can deviate only by the action of that board, is that it? Or do you contemplate bargaining such as is engaged in by the ordinary coal companies?

A. We expect that that bargaining will be done, but in effect with a board of vice-presidents as the sales manager, instead of having one sales manager, in order to take care

of the larger situation and the larger tonnage, we have the responsibility divided by having three or four men, and they are the sales manager.

Q. Are they supposed to be at the central office of the company all the time?

A. The majority of them are supposed to be at the central office all the time. And it is expected that such bargaining will have to be taken care of daily and hourly.

By Mr. Donovan:

That is exactly what is done today by a selling agent. We send our salesmen out with a price, but we say, "Now, if that price is not sufficient, or if you run onto an attractive piece of business, you phone the manager at (650) the Detroit office, or at the Cincinnati office, or at the Richmond office." And he has authority to say, "Well, you meet the [fol. 524] price." $5.00 is hard to imagine, but if it is $5.00, and the $4.75 that you referred to would get the order, it would get the order.

There was one thing we were almost definitely a unit on in all these meetings, and that was that we would have to make whatever competitive price was necessary to retain and expand the volume of business for these districts, and that any arbitrary price that might be made that would lose business to competitors, within the Appalachian region or outside would be bad business, and that we would have to meet the competitive price, and that the whole thing would be just as flexible as it is in our own company today.

I do not think that Appalachian Coals, Incorporated, could fix the market price of coal, even if it wanted to. Appalachian Coals, Incorporated, would perform the same function as an ordinary selling agent does today. It would have a greater tonnage and would have the responsibility spread over three or four men, in the central office, to make changes, instead of one man. These men, not only inspectors, but numerous salesmen, would be sent out to the consumers in the various districts, to keep in touch actively with the market. (651) There would probably be hundreds of salesmen in the active markets every day, soliciting business as sub-agents or direct employees of the Appalachian organization. You might have one man or a group of men who would devote their whole time to soliciting by-

product coal, and another gas coal, because of their special training. You would have, as we have today, and we sell our domestic coal under a separate head for that department; you would have those men practically soliciting their orders, except orders for domestic coal. We have other men who solicit orders for steam coal. We would do the same thing in this organization, except that we would have more men and we would have more coal.

[fol. 525] With reference to the question how orders would be distributed among the producers of coal after the orders were obtained: That is also a matter that came in for very much discussion in our Cincinnati meetings, in the meetings of committees, and the meetings of the board. It was realized that there could be no more equality in distribution, because the demand for the different qualities of coal varies so greatly. That what the people employing the company would want, would be assurance that it would be honestly distributed, that each man employing this agency would be treated as honestly and fairly as each other man or company availing himself of this company's services.

(652) In the matter of some coals, of a certain character, that over a yearly period, and as nearly as can be over a shorter period, that the orders would be given to the producers of that grade of coal, so that each of them would share as nearly in proportion to the orders that could be obtained, as possible, assuming that enough orders could not be obtained to give them all of the business they wanted. And that that would be true of all other grades and kinds of coal.

But that also that in making that distribution an attempt would be made, not to give one producer orders for steam coal of the smaller sizes, like nut and slack, and not give him orders for the resultant coal, lump and egg, if they were the two other sizes he made, but would try to balance those.

On the other hand, not to give a producer orders for lump and egg and leave the other grades on his track. That it would work out so that each man would ship the various sizes of coal that he had.

[fol. 526] The method of distribution of Appalachian Coals, Incorporated, as I understand it, would not differ

materially from the method pursued by the present selling agents, except with the larger tonnage to be distributed it would be much easier to balance the grades made at the mines. Under existing selling agents, the power to distribute exists in the selling agent. (653) And the method of distribution which the selling agent adopts is unknown to the producers of coal. The producer employing him depends upon his honesty and fairness. But under this method adopted, by Appalachian Coals, Incorporated, (654) it is agreed that so far as can reasonably be carried out that each of them would be treated on a basis of equality.

It is contemplated, and it was agreed in our discussions that in order that each producer might know at stated intervals whether or not he was being treated fairly by the agency, that a statement would be compiled and sent out showing the distribution of these various classes of coal between the various producers.

In Appalachian Coals, Incorporated, the producers of coal, as such, or the directors, will have no part in accepting orders, fixing or arriving at the prices, or the distribution of coal. That is a matter that will be left in the hands of the paid officers and executives of the company. And the board of directors will have nothing to do with that determination. All those matters will be reported to the (655) board of directors, of course, at their meetings, and like other boards of directors, they will be thoroughly free to express their opinion and make suggestions. But in order to establish such an agency the first prerequisite was to get producers to agree to sell through such an agency. And [fol. 527] to do that, after a great deal of discussion it was agreed that if producers had a voice in this distribution or sales of coal that they might be considered as being there, and fear might exist in their competing producers that they might favor the interests of their own companies. And this company is organized to run for a short period and continue from time to time, and the only way we can hope to keep these people that are contracting with this company satisfied is to assure them that the management is trying just as hard to serve one producer as another producer.

It is my opinion that Appalachian Coals, Incorporated, would not have the power or ability to drive competitors, particularly small ones, out of the market because the com-

petitive force of the outside producers will be just what it is today. In this region producing those 95 million tons of coal there are 137 defendants, there are 110 producers who are not defendants other than captive mines, and there are 20 captive mines. Now that leaves local and tremendous competition. As Mr. McGarry testified, there is also in this region a large number of mines that have shut down that could be opened up by the owners on short notice. I (656) have made an engineering study of the available coal properties in this whole region—I made it two years ago, before we considered this matter—and I found that there was available to the present railroads, without practically any extension of line more than side tracks or switches, almost one million acres of undeveloped coal land that could be brought into production on very short notice. I am speaking of the Appalachian region alone. And with that in mind, it would be the height of folly for an agency to attempt to bring about a condition that would bring this other coal into production or that would encourage the [fol. 528] non-members to increase their production, or to surrender the market to the competing districts in other states. The fact of the size of Appalachian Coals, Incorporated, would not give it the power and ability to drive competitors out of the market. It would give it prestige in the market. That is one of the things we hope for, that people would have confidence in its ability to serve, its ability to meet conditions and give prompt and efficient service of all kinds. It would have advertising value, and it would have a psychological value on the large consumer that here is a concern that under any circumstances can furnish me with a supply of coal. But it would not have any power to drive people out of business.

(657) It would not place Appalachian Coals, Incorporated, in a better position to sell below cost than anyone else is at the present time. The only item of cost that would be affected at all would be the selling cost. And that could only be reduced over a period as a better selling organization is worked out. But the operating cost would not be affected if we could, except as we sold more coal. If we could sell more coal we could reduce our costs somewhat, because the greater running time for the ordinary coal mine means a reduction in cost.

By Judge Parker:

Q. Why would not an organization of this magnitude possess the power—I do not know that because it possessed the power would be any reason to grant an injunction against it, in itself—but why wouldn't it have the power to do that because of its ability to sell below cost for the purpose of driving a competitor out of business and spreading the loss over a large number of producers.

[fol. 529] (658) A. The cost would not be spread over a large number. Under this contract, this selling agency sell-Island Creek coal will sell Island Creek coal distinctly from any other coal, at a price and return to the Island Creek Coal Company the full amount received for the coal, less the selling commissions. It is not an average price. Some sales agencies have been formed where they have averaged the return to the producer.

Q. I understand that. Here is what I meant——

A. This could not be spread

Q. Here is what I had in mind. Suppose you found that an independent producer had a valued customer that used a large amount of coal. He is selling right around the cost of production, or a little above. Why under your plan couldn't you go there and underbid him and take the business away from him and spread it out among four or five of your members? I am not saying that you would do that, but why couldn't that be done? Why isn't that a danger to be apprehended?

(659) A. You mean to spread the order among four or five?

Q. Yes; spread the orders out among your members. I understand you can apportion your orders as you see fit.

A. As I see it, the sales agency could not any more afford to do that than we can afford to do it today, because, after all, each of us would be standing the same proportion of the loss, if there were a loss. It would just be a matter of good business not to do it.

By Mr. Donovan:

Q. Would it be in accordance with the terms of the contract if you were to do it?

[fol. 530] A. No; because the contract provides that Appalachian Coals, Inc., shall obtain the best market price it can.

By Mr. Donovan:

Q. That is a stipulation of the contract?
A. That is a stipulation of the contract.

By Judge Parker:

Q. Here is what is bothering me. Competition must be relied on to keep the price around the cost of production. The cost of production, in the long run, determines the price, but supply and demand must be depended upon to keep it in that neighborhood. You cannot get away from that unless you can create a virtual monopoly. With this competition standing in the way of your raising your prices, if you go out and want to raise your prices five or ten cents a ton, (660) here is a competitor in the field that will meet your price and take the business away from you. If that competitor is out of the way, you can raise your price. Would it not be helpful to the selling agency to get rid of the competitor? It is helpful to most business men to get rid of competitors, and would not the temptation there be to lower your price, even though it were below the cost of production, with the thought that, with that competitor out of the way, you could recoup yourselves on other sales?

I am not saying you have that in mind, and I am not saying that there is a reason for granting an injunction in this case, because there is no evidence that you engaged in such practice.

[fol. 531] Judge Parker: I am merely speaking about whether, under this arrangement, there would be that power which could be exercised, and whether there is that danger to be apprehended.

The Witness: Here is a reason against it. Of course, any of us today can go out and cut the price and seriously injure our competitor, and perhaps force him into bankruptcy; but out experience has been that each time a competitor goes through a receivership or bankruptcy and wipes out his capital, there is a mine, with the coal, the railroad sidings, the tipple, and the equipment, and that somebody else can start it up the next day, without any capital investment, and he is a much more dangerous competitor than the man that you first had there.

(661) By Judge Parker:

Q. The last state is worse than the first.

A. The last state is much worse that the first. That is one of the things these bankruptcies and receiverships have been doing to the industry.

By Judge Northcott:

Q. Suppose you did enter into that kind of business, destroying your competitor. How long do you suppose it would take the Government, through some of its agencies—the Federal Trade Commission, for instance, with its alert Assistant Attorney General—to get after you about that and stop that kind of business?

[fol. 532] A. If this organization starts out in a perfectly legal way to do business, and departs from that legal method of doing business, it can and will immediately become an illegal organization and subject to indictment, just the same as if we had not started in a legal way.

Q. And it would not take the Federal court long to enjoin you from that kind of business, I imagine.

A. Any competitor or any consumer, or any member of the public would have the same right to complain of any illegal or improper acts as he would have under any other circumstances.

Judge Parker: I did not mean to intimate that you had any such plan in contemplation.

(662) The Witness: Judge, we thought of that and we have discussed it, and we know it is a question to be considered. But we think that if we run this organization with common sense and honesty we are not going to do that thing.

By Judge Soper:

Q. Mr. Francis, this idea suggests itself. There are, of course, degrees in competition. One does not need to be entirely an angel or entirely a devil in this world. He may be something in between. You and some of the other witnesses have pointed out today how difficult it is to get an efficient organization like yours out of a market once it gets into it—so difficult that even though there is a difference [fol. 533] of 25 cents out of a total amount of $1.50, with

that tremendous handicap, still you are able to hold your own, and more than hold your own. You do not need to put a man in the hands of a receiver in order to take a customer away from him. If you made up your minds to make a sufficient cut to get the business in a certain territory you would certainly (663) have the power to do it, and once you get in there it would not be so easy to get you out, if experience in the future is to be like that in the present and in the past. That does not involve anything necessarily criminal. It would be very hard to distinguish that from simply reasonable competition by a big man who wanted to get the business. What I am getting at is this. Does that suggest to you the exercise of a certain amount of power or restraint in trade that we ought to take into consideration in deciding a case of this sort?

A. I do not believe that the size or the power of this organization is sufficient to accomplish that. If we followed that practice as sales agents for these producers we would bankrupt the producers for whom we were selling, and the other producers would then have to compete with sellers that were bankrupt; and I do not think that we have that power. The people that did not employ this agency in this territory, that I discussed the matter with, that wanted to stay out and sell their own coal, did not feel that we had that power.

By Judge Parker:

Q. Is not this true: Your organization cannot succeed unless you make profits for the people for whom you are selling.

A. It cannot; and we cannot make profits by selling at less than the cost of production.

(664) Q. And such an organization as yours is does not adapt its selling below cost of production to the purpose of [fol. 534] eliminating competition, does it, such as might be done by large, compact organizations where there has been an actual monopolization or consolidation of industry?

A. No. If we had a consolidation of physical properties which we could legally bring about, then we would have a great deal more power. But we have got to satisfy each producer that this organization is for his own good. Now, we may not make a profit for the producers. If we had

started this organization on January 1st of this year, we could not have maintained the price of coal that was in effect on January 1st, in my opinion. The price of coal, according to the best information I can get, since January 1st of this year, has declined approximately 30 per cent. Now, we could not have prevented that decline of 30 per cent. We might have done a little better job than has been done; the decline might have only been 25 per cent, or 20 per cent, because of eliminating dumping and some similar patent evils and unfair trade practices, but we could not have prevented the price of coal from declining, because the economic pressure has been so great that we could not have simply gone upstream against the current.

Q. Mr. Francis, I see coal prices from the standpoint of the consumer only. What is coal selling at the mine now for, or about?

A. Judge Parker, we have to speak of mine run coal, generally, because it is all mine-run to start with. You can buy today from these Appalachian fields, good, high-grade, high volatile coal at prices ranging from 60 cents to $1.00 a ton.

(665) Q. Is that above or below cost of production?

A. It is below cost of production.

[fol. 535] By Judge Soper:

Q. At what point is that? Can you give us that? Where do you fix the cost of production?

A. At the mine.

Q. So you say it can be purchased at a price ranging from 60 cents to $1.00 a ton, and that is below the cost of production. Now, that must mean below something. What is that point?

A. You asked yesterday if we had any statistics on cost of production. We do not have any thorough statistics from this whole area on cost of production, but there are three district associations that assemble cost of production figures from their members in the ordinary course of business, and have done so for a number of years. One of these also assembles the average realization price. I have those prepared in exhibit form. They were made up for me by the secretaries of the associations that collected them in

their ordinary course of business, and I asked each of them if he would send me those statistics for his association, so that I could offer them in evidence in this proceeding. And Colonel Donovan has those exhibits at hand, and I should now like to offer them.

Whereupon a paper headed "Statement of Total Average Cost of Production in Kanawha District," was offered simply to be marked for identification, and was marked, "Defendants' Exhibit for Identification No. 15."

Whereupon a statement headed "Statement Showing the Cost of Production and Realization in the Harlan (County) District," was offered for identification and was marked "Defendants' Exhibit No. 16 for Identification."

[fol. 536] Whereupon a paper headed "Report of Cost of Production in the Williamson District Per Net Ton, 1927-1931 and Five Months of 1932," was offered for the purpose of identification, and was marked, "Defendants' Exhibit No. 17 for Identification."

(669) By Mr. Donovan:

In the agency contracts there is a provision providing that the producers have the right to name sub-agents for the handling of their coal. There were several very important reasons for that. In the first place, Appalachian Coals, Incorporated, could not start off with an efficient and effective organization. In the second place many of the sellers of coal—that the present agenices have well-equipped organizations in certain consuming districts, that have long established goodwill, (670) long personal contacts, and we felt that it would be very unwise to lose any goodwill or any personal contacts with the consuming and buying public. That if those organizations would be directed by a competent organization that they would be of great value and continue of great value in the distribution of coal. That some of them are specialists, have been handling certain kinds of coal, and others of different kinds of coal. And that it would be of the greatest importance to retain all sources of reaching the public efficiently.

But today the producer generally has very little contact with his agent. He sees his agent occasionally. He just leaves his sales in the hands of his agent very largely; he goes from the mines to the city and sees his agent, and talks

things over, and occasionally he corresponds with him, and he telephones him, but he really does not possess the knowledge, experience and information necessary to direct his agent. And it was expected that this organization would collect together an organization with such knowledge and [fol. 537] experience that they could direct the movements of such sub-agents and distributors intelligently and to the general advantage of the producer.

I believe that in periods of increasing demand Appalachian Coals, Incorporated, would retard price advances.

(671) My own experience has been that as prices advance in periods of demand, that the larger sellers of coal are more keenly concerned with retaining the goodwill of their buying public than the smaller sellers. That they do not advance prices as rapidly, and that they in periods of real stress fix a price beyond which they do not sell coal. And I have seen it done by numbers of companies in various periods of stress. We have practiced it in our own company.

Appalachian Coals, Inc., would not, in my opinion—and this is based upon the discussion in the meetings of the stockholders and directors—ship any coal from the mine unless it had a bona fide order for it from the sales agent and the wholesaler and the retailer or consumer. I think that would be one of the greatest advantages to be derived by the producers selling through this agency. It would not stop the practice of shipping by other people who are not contracting with Appalachian Coals, Inc. But it would relieve the market of a great deal of distress coal that materially affects the market price.

In relation to the pyramiding of coal: That was a new term, but I think a very good one. That Appalachian Coals, having no distress coal, having no coal shipped to billing points or to consuming centers which it desired to sell [fol. 538] before it arrived to prevent demurrage, would not offer coal generally through sub-agents or directly itself to the consuming public indiscriminately.

And I think it might be well, to explain one expression we have used here to the Court, that has not been explained, and that is this question of billing points. Under the Interstate Commerce Commission rules railroads—not all of them, but in our fields the Norfolk & Western and the Chesapeake & Ohio Railroad, will allow you to ship coal to

billing points unsold and so as to clear your mine tracks. (673) On the C. & O. they have two such billing points. One is at Russell, Kentucky, for coal going west. The other one is at Clifton Forge, Virginia, for coal going east. One is at the west end of the coal fields. The other is at the east end of the coal fields. You are not really supposed to send coal to the billing points unless you have billing for it, but producers having grades of coal for which they do not have orders, and wanting to clear their tracks and be able to run their mines, will send coal marked to themselves or their agent at one of these billing points, with the hope, usually, of having found a customer before it gets to that billing point. If that coal is sold before it gets to the billing point, it is billed and goes on to destination, and there is no penalty. But if he fails to find a market for that coal before it gets to the billing point, the railroad cuts it out and sets it on a sidetrack, and they charge him, as I remember, two dollars for setting it out.

A billing point is different from the shipping of coal on consignment to a consuming point like Chicago or Detroit. Shipping coal no bill and shipping it on consignment have the same effect upon the market.

[fol. 539] Volume 5 (678) JAMES D. FRANCIS, continuing direct examination.

By Mr. Donovan:

Defendants' Exhibits 15, 16 and 17 for identification were prepared by our statistician here from the statistics furnished me by the secretaries of the Kanawha Coal Operators Association, Charleston, West Virginia, the Harlan County Coal Operators Association of Harlan, West Virginia, and the Operators Association of the Williamson field of Williamson, West Virginia from data assembled by them in due course from month to month and made up on an annual basis showing the cost of realization (679) in the case of the Kanawha District and the Harlan District, the average cost of the companies reporting that information to the secretaries of those associations.

Defendants' Exhibit for identification No. 15 purports to show the average cost of production of the producing

members of the Kanawha Association, as reported by the members to the secretary of the association. That is the weighted cost. It does not attempt to show the individual cost of any company, just the weighted cost of the producers. When I use the term "weighted" I mean the total cost. That is arrived at by taking the total cost in dollars —the total cost of production, including all items of cost, depreciation, and royalties, taxes, and dividing that total amount by the total tons reported by the companies giving that cost.

[fol. 540] I do not know what that total tonnage is. That information was not furnished to me and it was not reported.

(680) Referring to Defendants' Exhibit 16 for identification, on the top of the page it purports to show the cost of production for the years of 1927 to and including the first six months of 1932. In that case it shows the total tonnage reported, the total cost in dollars, and dividing the dollars by the tonnage, to give the total cost per ton for producing that tonnage. In 1931 for example that was $1.53-3/10 a ton.

By realization I mean the average price received by the producer for his coal for any fixed period, taking into consideration contract sales that may run over a long period and spot sales. That does not include freight rates. This is at the mines. The table that I have here is on a mine run basis. This information was assembled by the secretary of this same Harlan Association and furnished in the same manner at the same time. The Association has a practice of assembling this information and they have given it to me.

(681) The secretary, in transmitting this, attached a blank of the items going to make up the cost of production. Not the realization.

Defendants' Exhibit 17 for identification is report of the cost of production, Williamson field, made up by the secretary of the Operators Association of the Williamson field covering the period on this exhibit from 1927 to and including the first six months of 1932. This gives the total cost of production, but subdivides the items of cost into a greater detail, as it shows the labor cost per ton, the supply cost per ton, the power cost per ton, fixed charges and general expense per ton. The compensation costs, that is the

amount paid to the State Compensation Insurance. And the total.

[fol. 541] Now in that compilation the items going into the cost and the cost report was changed at the end of '30, and beginning with 1931, as explained on the exhibit, the cost does not include salaries of employees or officials above the salary of the superintendent at the mines. And does not include the depreciation, depletion or royalty charge. So to that extent it is not total cost in 1931 and 1932, and is not comparable with previous years.

This information is obtained by the Association in the same manner as it is obtained from the other districts. Now in connection with this exhibit the reports sent me by the secretary did show the (682) tonnages and also showed by key numbers the companies reporting, the number of companies reporting, and the aggregate tonnage reporting for each period, but our statistician in making this up did not include that information. It could be included if desired.

(683) By Mr. O'Brian:

Exhibit 15, for identification does not disclose how many members of that district reported to the secretary of their association and how many did not report.

(684) It is true that cost of production is treated more or less as a confidential matter and many operators decline to furnish any information, even to their own associations. So that this exhibit, for the Kanawha District, is not a statement of the average of all of the operators of that district. I have no information to show whether the non-reporting operators were large operators or small operators. I have no information beyond the face of this document. It is true that the item of fixed charges is very important in the cost of production, and also the charge-offs for amortization, depreciation and depletion. And the percentages used vary with the different properties and different companies. There is a great variety in that. That would be a factor affecting the accuracy or inaccuracy of [fol. 542] these figures.

(685) I do not know whether or not Exhibit 15 for the Kanawha District is confined to defendants in this case. I assume it is both defendants and non-defendants. It is

true that Defendants' Exhibit 1, table 8, showing the realization reported by the Bureau of Mines, sets forth a tonnage of 13,607,443, while Defendants' Exhibit 16, purporting to show the average cost of production, is based on a tonnage for 1927 of 4,912,926. So that it seems that defendants' Exhibit No. 16 is based on only 35.9% of all the tonnage as shown in Table No. 8 of Defendants' Exhibit 1.

Referring to the figures given in defendants' Exhibit 16 for 1928, 1929 and 1930, it is true that defendants' Exhibit 16 is an (686) exhibit which, as to each of those years, is based on only a portion of the tonnage as set forth in Table No. 8.

Mr. O'Brian: I have made a computation of that tonnage. Perhaps I might hand this to the court (handing papers to the court). I am going to offer them in connection with this exhibit. It merely goes to the completeness of the exhibit. So that Exhibit No. 16, showing the cost of production and realization in the Harlan County district for the year 1927, is based on 35.9 per cent of the total tonnage; for 1928, on 40.3 per cent; for 1929 on 41 per cent of the total; and for 1930, on 37.6 per cent.

If the court please, I have made a comparative analysis of this Exhibit No. 16 with the defendants' previous exhibit covering all the tonnage, and I have prepared an analysis showing the number of months in which there is a discrepancy between the two. I have not had an opportunity to go over this with Colonel Donovan, but I know the figures are accurate, and if this Exhibit 16 is to be received, I will ask that this table be received with it. It is in the nature of a comment on Exhibit 16.

[fol. 543] By Mr. O'Brian:

As to the remaining exhibit, with respect to the Williamson field, this exhibit does not disclose the number of operators, nor the tonnage, on the face of the exhibit.

Q. Your counsel has furnished me, over night, at your suggestion, I think, Mr. Francis, with the work sheets from which (687) those results are obtained.

A. Yes.

Q. And asked that I treat them as confidential.

A. You can use them for any purpose.

Q. I have made an analysis of those sheets, also, for the purpose of showing, on the face of those figures, the variation, in a given month, between the lowest cost reported by one mine and the highest cost reported by another mine, and I would like to have you check that at your convenience, because I should like to offer that if the other exhibit is to be received.

Mr. Greever: The particular reason, if the court please, that the work sheets should go in, unless the sheets offered by Mr. O'Brian are accompanied by an explanation, is that for the year 1931 and the months of January, February, March, April, May and June of 1932, certain items of cost are left out, as stated by Mr. Francis here this morning during his examination. Now, with that explanation, it is not particularly material, as we see it, whether these work sheets go in or not, but we are perfectly willing for them to go in. However, if they do not go in, that explanation ought to go on the sheets offered by Mr. O'Brian.

Mr. O'Brian: I assumed that Mr. Francis had already testified to that. I will have that added to the sheets. That is, of course, true, if the court please.

[fol. 544] (692) Whereupon defendants offered in evidence the paper entitled "Statement of total average cost of production in the Kanawha District"; also a statement entitled "Statement showing the Cost of Production and Realization in the Harlan (County) District"; and the paper entitled "Report of cost of production in the Williamson District Per Net Ton, 1927-1931, and Five Months of 1932". They were received in evidence and marked defendants' Exhibits numbers 15, 16 and 17 respectively. Whereupon, the government offered in evidence the paper entitled "Harlan County Production"; (693) also a paper entitled "Harlan County Realization", and a paper entitled "Analysis of Data from which Defendants' Exhibit No. 17 for Identification was prepared, showing number of companies included, and variation in cost of production of operators in Williamson District". They were received in evidence and marked "Government Exhibit No. 18, 18-A and 19".

Judge Parker: We want it to appear in the record that it is only because of the withdrawal of the objection, that we are admitting the testimony. We feel that the testi-

mony is of such a fragmentary character that it could have but little, if any probative value. While ordinarily that goes only to the weight and not to the admissibility of testimony, the rule is that where testimony does not have a reasonable tendency to prove what it is called to prove, it is excluded, and not merely admitted subject to consideration of its weight.

Now, we think it fair to counsel to say this also; We regard the point to which this testimony is addressed, as a point of great importance in the case, and we think that if competent testimony could be adduced bearing on the point, that it ought to be adduced in a different form from this. [fol. 545] That is to say, we are dealing with the question of reasonableness of alleged restraint of trade. As bearing upon the question of that reasonableness, the condition of the industry may be an important consideration. It is alleged by defendants that the industry is in such condition that it is selling coal at less (694) than cost of production. That may or may not be an important consideration when we come to a final decision of the case, or when the Supreme Court comes to a final decision of it; but in the light that we have on the case now, we are inclined to think that that may be an important consideration. If so, the facts ought to be before the court, and they ought to be before the court by competent testimony or by admissions of counsel.

Mr. O'Brian made a statement to the court which constituted a general sort of admission with respect to this point, but the court is in some doubt as to what he intended to admit, and how far his admission went. He said, as I understood him, that he did not controvert the fact that some producers of coal were selling their product at less than cost of production. He did not indicate how general that was, or for how long it had continued, or to what extent it was prevalent, or how great the lossess sustained by the operators who engaged in that practice was.

Now, if he wants to clarify any admission that he has made, with respect to that, of course, the court will hear him. If he does not, and if you gentlemen want to introduce testimony on the point we will hear that. We thought it fair to you to have you understand at this point what our attitude is towards this testimony.

[fol. 546] (695) Mr. O'Brian: The Government admits that many of these defendants are now and have been operating at a loss for at least several years. How many of them are so operating the Government has no means of determining; how many of them have been operating at a profit the Government has no means of determining; partly because as testified to by the witness, Francis, operators are reluctant to state in an identifiable form the conditions of their operations and their cost of production. All of those facts are in the hands of the defendants. Beyond the general admission which I made at the opening of the case, and I now repeat, that the Government does not controvert the fact that many of these operators are now and have been at least during the years 1932 and 1931, operating at a loss, the Government is unable to make further concessions because it has not facts.

Cross-examination.

By Mr. O'Brian:

The eleven districts that were suggested to consider the original sales agency plan are shown on defendants' Exhibit B. Taking the territory beginning in Pennsylvania, the natural subdivisions from the standpoint of coal production are central Pennsylvania and western Pennsylvania.

(696) There are a number of subdivisions in both regions. Central Pennsylvania is largely low volatile coal. Western Pennsylvania, high volatile coal. But they fall into natural groupings.

East of the Mississippi River committees were appointed for 19 groups or local districts. Eight of those being groups that now make up the Appalachian region referred [fol. 547] to herein. Outside the Appalachian territory there were left the following districts in which it was recommended the plan be considered: West Kentucky, Indiana, Alabama, West Virginia Smokeless, northern West Virginia, Ohio, Illinois, Freeport Thick Vein District, which is in western Pennsylvania, and western Pennsylvania.

(697) Separate committees were appointed for the Freeport thick vein district which is in Western Pennsylvania, and for Western Pennsylvania. They are adjoining high volatile producing districts. And central Pennsylvania.

As I stated in my direct testimony, 8 of the districts met together and were later consolidated into the defendant here, the Appalachian territory. If further districts adopt these plans, it is possible that there may be further consolidation as to some of the remaining districts. So that if each district which I have referred to adopted this plan there would be 11 or 12 selling agencies east of the Mississippi. If any of those districts consolidated, the number would be smaller than 11 or 12.

Mr. Bradley, who presided at the New York meeting, and who appointed these committees is not in any one of these districts. He is in a separate local field lying between the Kanawha district on the south and northern West Virginia on the north. Separated from the other large producers by quite a (698) little distance in both.

At our meeting with the Governor of West Virginia, which preceded these meetings in New York, the Governor was told that one state alone could not cope with the problems presented. At the meeting with the Governor there was discussion on the question of the legality or illegality [fol. 548] of any method of reduction of production. The lack of the power of the states to take any such action. The Governor also discussed and we discussed at (699) length the question of freight rates, freight differentials, wage rates, wage differentials, and the general condition in the industry. The question of price was not given very much part in the discussion except that prices were low. At the New York meetings, which followed the meeting with the Governor, we discussed a number of plans put forward by various people seeking to bring about a more regulated production and the methods of realizing a better price for our coal.

(700) Following the New York meeting, at which these proceedings were taken which I described in my direct testimony, copies of this pamphlet, defendants' Exhibit B, attached to the answer, were printed and generally distributed throughout the bituminous industry. I could not state about how many copies of it were put into circulation, but I assume several hundred. The expense for that was defrayed by the National Coal Association. And the legal expenses in connection with that matter were likewise defrayed by that Association.

The National Coal Association is an association composed of district coal associations, as well as individual producers as members. The larger part of the membership in the National Coal Association is through districts. A district will become a member of the National Coal Association for its members, but they also have individual memberships, where there are no associations, for non-members of local associations. The president of that Association is Mr. Bockus.

Mr. Bockus called the New York meeting. He presided at the meeting when it was called. He has attended meetings of (701) the Appalachian group. His company has contracted with Appalachian Coals, Incorporated, but whether he has taken any particular activity in districts outside of the Appalachian, I do not know.

[fol. 549] The Island Creek Company operates solely in the Appalachian territory. I have stated that I am a director, or an officer of one of the companies operating in the Smokeless field. That is the Pond Creek Pocahontas Company, and its production is approximately 100,000 tons a month. That is approximately 1,200,000 tons a year. I checked up some time ago as to the comparative size of that company in the Smokeless fields, and it is my recollection it was about 8th or 10th in size, but I may be mistaken. The tonnage has gone up somewhat. That company is affiliated with the Island Creek in this way. (702) The Island Creek Coal Company manages that property under an operating management contract, and sells its coal under a management contract, for a consideration to be paid by the Pond Creek Company.

Island Creek Company does not manage any other companies in the Smokeless field nor any other companies in other places. I am vice-president of the Island Creek Company. Mr. Davis is president. Mr. Davis is chairman of the committee in the Smokeless coal area that has been giving consideration to this matter.

(703) Mr. Davis is president of the Pond Creek Pocahontas Company, and I am vice-president of that company. Mr. Davis has been or is chairman of the Smokeless committee, considering the plan of organizing a selling agency in the Smokeless districts. I do not know whether or not the central Pennsylvania district has had any meetings to consider such a plan. I have not kept advised to

that extent. My recollection is that counsel for the Central Pennsylvania Coal Producers Association, Mr. Liveright, stated in my presence that the matter had been submitted to him for an opinion. (704) I do not know what action they have taken in regard to the matter at all, and I have not seen his opinion. It was not decided or recommended at the New York meeting that when each of these districts should set up its plan, its plan should be submitted to Mr. Donovan as counsel.

[fol. 550] That was left to each group as to whom they would submit it to. Colonel Donovan said to us that he was considering this matter in broad outline, in giving us the opinion contained in Exhibit "B" filed with the defendants' answer, but if there were variations or departures from that plan, that each of them would have to be considered on its merits, and each district was free to employ any counsel that it might choose, to give them such an opinion.

I recall the language in Mr. Donovan's opinion (set forth in defendants' Exhibit B, p. 22) that "it is assumed that the plan for a common selling agency will be adopted, if at all, by the entire industry".

(705) I testified that several meetings were held in December and January, following this meeting in New York, of those interested in the industry generally. And at the meeting of January 27, which I have described, which was held at Cincinnati, the minutes stated at the outset: "After a brief statement by the chairman as to the purpose of the meeting, Mr. C. B. Huntress, executive secretary, National Coal Association, told of the inception of this movement and what was being done in other fields." I considered that statement, relating to what was being done in other districts, as a matter of information. To some people, it might have been considered an inducement to those present to go ahead with the organization of Appalachian Coals, Inc. I don't remember what districts he told about. I remember Mr. Huntress making (706) the statement. I stated on direct examination that it was expected that additional operators would come into association with Appalachian Coals, Inc., and that is still the expectation.

I recall that at this same meeting, referring to the threatened litigation by the Government, Mr. Bockus stated

that he thought the matter being brought up at this time was very fortunate, and that when this case was decided it [fol. 551] would clear the way for a number of operators to take stock in this concern who had withheld doing so. Mr. Bockus' feeling about the matter was slightly different from my own, but I think his feeling was shared by a number of operators. Yes, it was hoped, that in addition to the present membership of Appalachian Coals, further operators will join up with Appalachian Coals, Inc., so that the selling agency will have at its disposal more than 73%. It is still hoped that that is true.

(707) All the Appalachian producers were invited. We may be able to obtain additional members, or contractors, for the sale of the coal, and it is possible that we may lose some. I have been told by two producers that they might do that. I think that we can expect a few more producers to employ this agency.

(708) I cannot remember at this moment any one who is holding out in order to wait and see if this plan would be declared legal. One of the moving considerations why we combined 8 districts into one agency was that we wanted to get enough tonnage to carry the expense of the organization. I am aware that one single district, the Logan district, of our agency has a larger production than the whole western Kentucky district. Western Kentucky from a competitive standpoint, in the competitive markets, has markets available where it has less competition than the Logan region, and it is geographically situated whereby it has a geographic advantage that other districts do not possess. I think that the Kanawha district has about the same production as the western Kentucky district.

(709) By Judge Soper:

This (pointing on the map) is Appalachian territory, and western Kentucky lies in the western part of the state (710) of Kentucky, just south of the Illinois-Indiana line. It is right in here as shown on this map. It is high volatile coal.

[fol. 552] By Judge Northcott:

It is across the State of Kentucky from the Harlan District. The Harlan District is in the eastern part of the

State of Kentucky. And this western district does not extend quite to the Mississippi River. It is down in the Paducah section, about 300 or 350 miles west of the Harlan section. There is no connecting coal production between these two districts. They are separated by practically the entire state of Kentucky. One is in the extreme eastern end of the state and the other is in the almost extreme western end of the State of Kentucky. There is no community of interest geographically, and they (711) are competing districts with different freight rate structures and with different markets.

By Judge Soper:

The Big Sandy district is not in western Kentucky. It is one of our districts.

By Judge Parker:

The western Kentucky district is governed by an entirely different freight rate structure than the Appalachian region. They are not differentially related in the markets, and the west Kentucky (712) district distributes its coal in markets that are not reached to any large extent by the Appalachian producers, except the western part of Kentucky and the western part of Tennessee. Speaking generally, the eight separate districts embraced in Appalachian Coals, Inc., as among themselves, have to some extent different freight rates to the various markets.

By Mr. O'Brian:

Q. Now returning to this meeting at Cincinnati. These minutes state, in substance, that it is the sense of this meeting that the committee headed by Mr. Francis continue their efforts to secure sufficient tonnage to make Appalachian Coals, Incorporated, effective, it being agreed that there should be a minimum of 70 per cent and a maxi- [fol. 553] mum of 80 per cent, and that it is the sense of the meeting that this committee be given plenary powers. Why did you fix those two percentages, a minimum of 70 per cent and a maximum of 80 per cent?

(713) A. There was a great deal of discussion as to what percentage of the commercial tonnage, excluding captive,

would be necessary to make an organization that would be worth while, and wide differences of opinion between the different people at the meeting, and the figures of 70 per cent and 80 per cent were a compromise figure as to what should be named.

A resolution was offered at that meeting to make the maximum 90% and that was voted down, because there were a number of operators that felt that if we had more than 80% of this commercial tonnage other than captive, in an organization, that it might unduly restrict the competition in the local markets, and that it would be wiser from a legal standpoint to limit it to 80%. Fixing the 80% was in view of the danger of an illegal restraint of trade, in the minds of the people who introduced the resolution. (714) That was partially the explanation of the reason the majority of those present voted down a resolution to make the maximum 90%. And then there was one other consideration that was discussed and may have influenced a number of people, and that was there might be production of mines of such low quality and low preparation that it would not be wise to attempt to sell it in the markets. But that may not have influenced very much. This 80% applies to production exclusive of captive mines.

By Judge Soper:

A number of people thought 50% was sufficient, but 70% was the compromise figure because it was thought that in order to have a large company, to get the best officials to [fol. 554] carry out the various sales and advertising campaigns, and to so far as possible eliminate the practices of shipping on consignment and dumping, that if you did not have a very substantial tonnage you could not eliminate to any effective extent the evils that we hoped to eliminate by this organization.

(715) There was no discussion in regard to the possibility of taking 70% of capacity rather than 70% of production. It was realized that all mines—practically all companies could greatly increase their capacity, and generally that they could increase their capacity in proportion to the production that they had had. It was generally regarded that 70% of production was tantamount to 70% of capacity. No calculations were made.

By Mr. O'Brian:

It is fair to infer from what I have said that those at the meeting, or at any rate a majority of them, felt that the organization of this selling agency would exercise some degree of restraint in trade, but that if that restraint were confined to 70% of the production, it would not be illegal. When we came to apportion the stock of the selling agencies and fix the conditions upon which operators might subscribe for stock in Appalachian Coals, Inc., we gave no consideration to the subject of capacity. We measured the right to subscribe for stock in terms of existing production. (716) We picked out a past period as the simplest way to arrive at it.

The capitalization of the Island Creek Company is represented by approximately 600,000 shares of common stock and 25,000 shares of preferred stock. Both of them are—they are not nominal shares, but they are shares with a par value of One Dollar, which is almost a nominal value stock. [fol. 555] We carry our properties on our books at the present time at approximately $20,000,000. My recollection is that we were only operating 9 of our mines, in 1929. (717) Our largest production was in 1927 and it was something over seven million tons. In 1931, it was 4,300,000 tons.

(718) My recollection is that the charter for the Island Creek Company was obtained in 1909. The Island Creek Company in 1915 acquired the properties of the United States Coal and Oil Company, and these operating mines. The development began in 1902. Referring to Defendants' Exhibit 5, this shows that for the period from 1927 to 1931, our company steadily made a profit.

(719) It shows that our profit per ton in 1927 was 48.82 cents, after deducting a charge for depletion, depreciation and amortization of 14.27 cents; it shows for 1928 a total production of 5,627,669 tons, and a profit per ton of 53.21 cents, after a deduction for depletion, depreciation and amortization of 16.80 cents. In connection with that production, I call attention to the fact that that produced by lessees was not our production. It was property we owned and leased to other producers. It makes a slight difference.

In 1929, the total production on the same basis was 6,577,403 tons, and our profit per ton, as here shown, was 57.72

cents per ton, after a charge off for depletion and so forth, of 17.41 cents per ton.

In 1930 our total production on the same basis was 5,722,-591 tons, and our profit per ton in the year 1930 was 43.71 cents, after a charge off for depletion, etc. of 15.19 cents per ton.

In 1931 our total production on the same basis was 4,462,-502 tons, and our profit per ton was 33.41 cents, after a charge off for depletion, etc. of 14.48 cents per ton.

[fol. 556] (720) So that even in those two years of the depression our company made a profit.

This statement shows that during the years 1927 to 1931, other companies made money and other companies lost money. (721) During these years other defendant companies have made a profit. It is my understanding of this exhibit that it is compiled from published statements of those companies whose stocks are listed on the New York stock exchange, and it includes companies that are not defendants here, as well as companies that are defendants. In regard to our own company management and our sales force; we have a vice-president in charge of sales, whose general offices are in Cincinnati, Ohio. We have a general sales manager and we have sales offices in Detroit, with a sales manager in charge, and a sales office in Richmond, Virginia, with a sales manager in charge. His territory runs from Pennsylvania to South Carolina and into Georgia.

We have a sales manager in the New York office, and a sales manager in the Cleveland office. In Chicago territory, our coal is distributed by the Globe Coal Company as agents. And in Canada, our coal is distributed by the Weaver Coal Company of Montreal. In New England, H. C. Sprague & Company distributes the coal for our company, and for a group of other companies. (722) In the Cincinnati office, we have a manager of what is considered Cincinnati territory of retail sales, and we have salesmen working out of that office, selling various grades of coal. We have retail salesmen and steam salesmen and general salesmen.

Between 25 and 30 men are employed by our company in selling our coal. As I stated yesterday there is a great variety of equipment used in the mines for taking out coal, [fol. 557] That is generally true throughout our territory, especially for the sizing and cleaning of coal.

In mining phraseology, coal is first undercut with an electrically-operated cutting machine. And the next operation is to drill holes for blasting. That is done with electrically operated drills. The coal is then blasted down, and is then loaded into mine cars, and is hauled from the place at which it is loaded in the mine.

(723) It is hand-loading. The loader is supposed to pick out all impurities that he can see, and leave them in the empty spaces in the mines, and load the coal into cars. The coal is hauled from the places where it is loaded, to the bottom of the mine, where it is either dumped on belts or conveyors, and carried up to the tipple, or is elevated by elevators up to the tipple in mine cars. That is done by electric locomotives. In our mines, we have an underground transportation system of about 460 miles, 460 miles of underground railroad, I mean, used in transporting coal from all the mines. That requires a despatcher-system and a regular transportation system, in order to do it.

There is a variety of mechanized equipment in the Appalachian territory, but it is not great. I have tabulated that, with the assistance of the railroads, Norfolk & Western, Chesapeake and Ohio, and Louisville & Nashville Railroads, and used that information in rate litigation before the Interstate Commerce Commission. And approximately 97% of all the coal produced on those three railroad systems in the Appalachian territory is mined from mines that are equipped with electricity, for their general uses.

(724) Our company does not have a separate traffic and rate department. I look after a great deal of that myself, and our people generally are conversant with the rate [fol. 558] situation. I do not think that in the smaller mines there is more loss of coal in getting out the coal and getting it to the market, than in the case of the larger and better equipped mines. Some of these mines are operated from that standpoint just as efficiently as the larger companies. They necessarily do not make, as a rule, the expenditures for new and modern equipment that the larger mine makes. Some of them are efficiently operated. It depends largely upon seam conditions. There is a very wide and very great variation in seam conditions.

(725) As a broad proposition, it is true that one of the chief handicaps in the case of the smaller operator is that

he has not the same market information and the same facilities for selling and marketing his coal that the larger operators have, although many of them employ the larger agencies to sell their coal. It is true that there has been a distinct tendency in the last ten years toward the growth of larger mines, and a discontinuance of smaller mines.

As long as a mine is going, the element of credit, the ability to secure credit for operations, does not affect it, usually very much, until it actually goes into the hands of a receiver, so far as the operation and production of coal is concerned. But when receivership or bankruptcy comes on, of course that changes the situation materially. By that I mean that a company whose credit is good but is not properly financed, as long as it can meet its payrolls and power bills, and the necessary immediate cost of production, the out-of-pocket cost, in other words, lack of credit does not restrict its ability to produce coal, as long as it can meet these items. (726) When he gets to the point where he cannot meet those items he then goes into bankruptcy.

[fol. 559] There are other items for which a coal company needs credit. Items of taxes. Items of royalties. Amounts for supplies that the wholesalers extend credit for; they extend credit for a long period of time to companies in failing circumstances. But as long as that credit is given and as long as the property is not sold for taxes or the landlord forbears on his royalties he can go along and produce coal just the same as if he were paying them. And in Logan County last year a very large number of our companies did not pay their taxes. They did not pay them the year before. They were delinquent, but the company goes on just the same. Some day the state may attempt to collect those taxes. But it usually requires a matter of considerable time. In the meantime the company goes along and disregards those things. There are two items that must be met by a producing company almost concurrently, and that is wages and in the main, power bills for the electric power used.

(727) Table 7 of Defendants' Exhibit 1, over in the second last column, gives the number of mines that were in operation in 1921 as 8038. And in the year 1930, nine years later, it gives the total of mines then in operation as 5,891, or a shrinkage of 2,147 mines. During that same period

starting with the year 1921, the Class A mines, which are given in the first column of Table 7—that term meaning mines of more than 200,000 tons annual production—the number of those mines then in existence was 482, and they controlled 39.1 per cent of the annual production.

In 1930, Class 1 is shown as subdivided into Class 1-B, which is 200,000 to 500,000 tons, and Class 1-A, more than 500,000 tons. So that those two classes together make up what was previously Class 1 in the earliest sheet.

[fol. 560] This exhibit shows, that of the mines of more than 500,000 tons there were 173, and mines from 200,000 to 500,000 tons were 543, or a total of 716 large mines (728) in 1930 as compared with 482 in 1921. Adding together the percentage of total production of Class 1-A and Class 1-B, it appears that Class 1-A and Class 1-B, that is mines producing more than 200,000 tons annually, in 1930 produced 63.1 per cent of the total production, as compared with 39.1 per cent of the production in 1920. So that it is true that there has been a distinct trend toward the growth of the large mine, and there is a very important explanation for that growth.

In 1921 and in the years previous to 1923 the production of mines was limited by car supply. With the advent of free car supply the production of mines that had a large potential capacity resulted in mines with large actual capacity. And I think that is the general explanation for the growth of the mines with larger productive capacity during this period. There was a similar steady increase between the years 1925 and 1929.

It is true that whereas in 1921 there were only 482 mines having an output of more than 200,000 and having a percentage of total production of 39.1 per cent, in 1930, the larger mines, those over 200,000 had grown to (729) 716, and they then had 63.1 per cent of the total production of bituminous coal.

We come into competition with foreign coals, just as we come into competition with oil and other sources of fuel and anthracite. It is true that the amount of foreign coal that is imported as compared with the amount that is exported is very small. Our exports mainly go to Canada. I believe most of the imported coal is anthracite.

[fol. 561] Q. You testified that you had come in contact or in competition with coal from Soviet Russia and also from Indo-China.

A. Yes.

Q. Now on looking at the census table I found that in 1930 only one ton was imported from each of those countries. I do not know whether it was for a museum, but would that accord with your recollection?

A. I do not have the statistics in mind, but in 1931 coal arrived in New York and Boston in shiploads from Russia and from China.

Q. Well, that must have been, however, a negligible amount as compared with our total production?

A. It was a very small amount.

(730) But it only shows a potential source of supply, and it was one reason the coal operators worked very hard to have a tariff placed on the importation of coal, because we felt it might be a very serious source of supply.

(731) I testified yesterday that our coal came into competition, or would come into competition, in the State of Michigan with coal from central Pennsylvania. It is true that Defendant's Exhibit 1, Table 6, shows that in the year 1929, in the column headed "Michigan" there came into Michigan only 10,422 tons from central Pennsylvania. And it also shows in the third column from the last, headed "Great Lakes Shipments" that central Pennsylvania's total shipments up the Lakes were only 180,126 tons.

[fol. 562] (732) So that the exhibit shows that central Pennsylvania did not sell a substantial quantity of coal in either market in 1929. I do not recall whether or not it is true that no coal moved by rail in that year from central Pennsylvania to Michigan, but I would not be surprised to find that to be true. It is true that on the basis of the total coal produced in central Pennsylvania, which appears in the first column as 45,000,000 tons, the amount that was shipped to Lake ports would be less than one-half of one per cent. They had rates to the Lakes that were less than the rates from our districts. Why they did not ship it, was a matter of choosing their markets, and whether they worked that market or not. It might have been due to the preference of people in Michigan for our coal, and consideration of price and service.

[fol. 563] (733) Our exhibit shows total shipments by the Appalachian territory into Michigan of 14,522,291. The nearest competitors in point of shipment were the two Smokeless fields. We usually group the two Smokeless fields as one. The only other competitor that shipped bituminous coal into Michigan, of over 300,000 tons, was Southern Ohio, with 500,000 tons. So that, according to this exhibit, as compared with our shipments into Michigan in 1929, of 14,000,000 tons, northern Ohio shipped in 250,000 and southern Ohio 500,000. The total was 750,000.

(734) So, with regard to all rail coal, these three competitors, Appalachian, Smokeless, with a total of about 33,800,000, and Ohio, with a total of about 750,000, were the three real competitors in Michigan in that year. Of course, Michigan, in addition to this all-rail tonnage, received substantial amounts of coal by Lakes, and that was true of the Southern as well as the Northern districts. The Pennsylvania, Pittsburgh, Fairmont and northern West Virginia Panhandle districts go into that territory all-rail on a rate equal with the rate from the bulk of the Appalachian district, but by Lakes they reach that market on a rate of 35 cents less, for the Pittsburgh district, than ours, and 20 cents less than the Fairmont district, or northern West Virginia. How much of the Lake tonnage that went in went from those districts, we have no way of determining.

(735) Pittsburgh does not have an advantage all-rail over the Appalachian territory. They are on the same basis—all-rail. Yes, they shipped in only 228,000 tons into Michigan, as against our 14,000,000.

By Judge Parker:

This same exhibit has the information as regards the [fol. 564] Lake cargo tonnage, in the third tabulation from the end under the head of "Great Lakes Shipments." (736) It shows that out of a total of 39,000,000 tons of Lake cargo, Appalachian shipped 17,000,000, Western Pennsylvania, including West Virginia Panhandle, shipped approximately 9,000,000 tons, northern West Virginia shipped one and a half million tons, northern Ohio 3,350,000 tons, southern Ohio, 378,000 tons, and central Pennsylvania, referred to by Mr. O'Brian, 180,000 tons; New River-Winding Gulf—that is low volatile Smokeless—1,398,000, and Pocahontas-Tug River, 6,273,000.

(737) By Mr. O'Brian:

Defendants' Exhibit 1 shows that the Appalachian territory shipped into Ohio in 1929 about (738) 16 million tons. And that western Pennsylvania shipped in 14,051,930 tons, western Pennsylvania including the West Virginia Panhandle. And northern Ohio, and this is in the State of Ohio, 5,209,000 tons, and southern Ohio, 2,369,000 tons, making about seven million or eight million tons from the whole of the State of Ohio, and the two Smokeless fields together, about five million tons. And those that I have named were the substantial competitors in the State of Ohio, ignoring the shipment of 226,000 tons from the Somerset district.

Defendants' Exhibit 1 shows that the Appalachian territory shipment into South Carolina amounted to 2,295,000 tons and that the only other coal which was shipped into that territory in 1929 was 1,743 tons from the State of Alabama. And the combined shipments of the two Smokeless fields amounted to a total of 102,806 tons.

(739) Defendants' Exhibit 1 shows that Alabama and the Smokeless were the only two competitors who shipped any coal at all into South Carolina, except the Appalachian territory.

[fol. 565] It is also true that of the coal shipped into South Carolina from Appalachian territory, 75% of all that Appalachian coal came from the Virginia district. I think it is true that in the Virginia district these defendants instead of controlling 73 and a fraction per cent of the total production, actually controlled 84 per cent of the production of the Appalachian territory located in Virginia. I have not checked the figures but I think that is true. I will accept your statement that 54 defendants sold Appalachian coal in South Carolina in that year. We furnished you those statistics but I have not seen your compilations.

(740) It is true that there were only 5 operators in the Virginia district, out of 20 operators, not connected with the Appalachian Coals, Inc.; that is, 5 independent operators out of 20, who in that year produced 100,000 tons of coal or over. And the largest one of those produced only 233,463 tons of coal.

(741) In the light of that situation, I still give it as my opinion that the defendants would not have the power to

control the price in South Carolina. We do not expect to eliminate price competition as between the different kinds and grades of coal for different purposes going to the South Carolina market. I am speaking of the defendants. They will offer different kinds and grades of coal at different prices. The price will be fixed by the selling agency, of course. There was produced in the Virginia territory in 1929 in non-defendant companies 1,895,000 tons of coal, exclusive of captive mines.

(742) But there is available to that territory production of coal in Tennessee and southeastern Kentucky in substantial quantities, some of which went into that state in 1929 from the southeast Kentucky, Harlan and the Tennessee district—approximately 238,000 tons. From the north-[fol. 566] east Kentucky, the McRoberts district, 59,000 tons. And from the Kanawha, Logan and Thacker districts, 178,000 tons. Now all those districts have larger potential capacities that can go into this market.

Yes, it is true that of the coal that did go in there, 75% of the Appalachian coal came from the Virginia district in which our defendants have 84% of the production. Defendants' Exhibit 1 shows that in 1929 the Appalachian territory shipped into Georgia 2,541,533 tons, and that the only other substantial shipment of coal that went into Georgia was a shipment from Alabama of 459,463 tons. (743) And that the only other coal used in Georgia was twelve thousand and a fraction locally, and about ten thousand from the Smokeless field and four hundred from west Kentucky. So that in the State of Georgia, we had only one competitor in that year, that was the Alabama field, which shipped in 459,000 against the Appalachian 2,500,000. That is, speaking of the Appalachian region as a whole and not the defendant companies.

Our Exhibit shows that the only coals which went into North Carolina from any district east of the Mississippi in 1929 were the combined shipments from the two Smokeless fields, which totalled one million tons. So that we had only one competitor in North Carolina in that year, the Smokeless fields of West Virginia and southern West Virginia and the Appalachian producers generally, defendants and non-defendants.

By Judge Soper:

Referring to the caption "Producing District" in the very beginning of the Table 6, the names of the districts in there, Kanawha, Logan, Kenova, Thacker and so on, are the names used by the railroads in (744) tariffs designating the freight rates, and they have been adopted [fol. 567] by the coal producers. They comprehend the eight districts which are united in the Appalachian Coals. They also include that scattered tonnage of 12 million tons I referred to yesterday on the outside. They are in the same railroad groupings and the same freight rate districts of origin.

By Mr. O'Brian:

I will accept your statement that Exhibit No. 2 of the Government by actual count shows that 77 of our defendants were competing with each other in North Carolina in 1929. We have no idea how many non-defendants were so competing.

I have said that there is potential competition in this field, from non-defendants, and as to a part of the field from Alabama producers.

(745) By Judge Parker:

Q. Basing that upon the fact that they produce available coal, and that the freight rates are not prohibitive. But is it not the fact that you have an efficient selling agency in these fields, your members do, have already established trade, and these other people do not have an established trade, a factor which should be considered there as bearing upon the effectiveness of the suggested potential competition? In other words, if a producer is not in a field is it not a hard matter to get in the field?

A. It is expensive to establish yourself in a new market, unquestionably. I do not know how much of this tonnage going into these fields, in the case of any of them, comes from the 137 defendants, or how much comes from the mines of the 150 non-defendant producers, but it is a fact that, being established in a market, having the good will of the customer, and having given him good service, is worth a great deal in any market, and we are trying to retain that [fol. 568] good will by distributing coal through the sub-

agents that have that contact and have that good will. We feel that we need it, and we are trying to maintain all that good will. As to Alabama, we will produce an Alabama witness who will testify as to their situation.

I do not know whether or not the Alabama operators have taken any actual steps to organize a selling agency. Mr. Yerkes, who is here as a witness, attended the New York meetings, but what they did down there in the State, I have no personal knowledge of.

By Judge Soper:

(747) Assuming that central and western Pennsylvania or some field which has potentialities as a competitor of Appalachian Coals, do not organize a common sales agency, whereas the Appalachian people do organize and operate one, I do not believe that the difficulties of that field in getting into the Michigan territory, for instance, would be very greatly enhanced, even though these separate independent Pennsylvania operators have to meet the combined forces of the Appalachian producers.

Price competition is so keen, and buyers are so careful to get the best bargains possible, that, considering a delivered price, a difference of a cent or two a ton in the delivered price, will switch business from one producer to another producer, from one district to another district, and I do not believe the Michigan consumer, if offered a product equal in computed value to him, will pay us more than he will pay any other producer that can furnish him with satisfactory service. The satisfactory service is always an element to be taken into consideration.

By Mr. O'Brian:

Yesterday I stated that there were 110 outside operators. That is my recollection. But there are 130 of (748) the non-defendant producers other than the captive and there are 20 captive, making a total of 150.

[fol. 569] It is true that if the Alabama district is organized into a selling agency similar to Appalachian Coals, with a similar amount of production in its hands, and if the Smokeless organization which has already been commenced, functions with a similar control, then the only three parties

competing in North Carolina, on the basis of 1929 competition, would be three agencies, plus the persons in those districts not embraced in the agencies, and plus this potential competition that I speak of.

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(751) Ben E. Tate, a witness called on behalf of the Defendants, being first duly sworn testified as follows:

Direct examination.

By Mr. Donovan:

I live in Cincinnati, Ohio, and Chicago, Illinois. My office number in Cincinnati is 829 Dixie Terminal Building. I am one of a family of vice-presidents of the Utilities Power & Light Corporation, located at 327 South LaSalle Street, Chicago, Illinois. (752) This company operates the Indianapolis Power & Light Corporation, the Laclede Gas Light Company at St. Louis, the Laclede Electric at St. Louis. We operate public utility properties along the coast of Connecticut, the Newport Electric Company in Rhode Island. We operate the Interstate Power Company that extends from Harvey, North Dakota, into Oklahoma, and to the towns of Dubuque and Clinton in Iowa, Rochester in Minnesota, and towns of that character. There are 11,000 miles of high tension lines through the district.

Up to now our power has been developed principally by coal. The coal for the Interstate Power plants comes from the West Virginia districts, from Indiana, from all the districts in that State, from Illinois, lignite coal from North Dakota, and Arkansas anthracite, and coal produced in the Appalachian district over the Northwestern docks.

[fol. 570] The approximate amount of coal purchased by our company from each of the producing districts in the 1931-1932 coal season are 650,000 tons of Eastern Kentucky coal; 770,000 tons of Southern Illinois coals; 280,000 tons of West Virginia coals; 720,000 tons of Indiana coal; 25,000 tons of North Dakota coal; 40,000 tons of Pennsylvania coal.

(753) 650,000 tons of that coal comes from the so-called Appalachian districts. We could take comparable coal from

Pennsylvania, from the Westmoreland and Youghiogheny fields, and we can take the thick vein Pittsburgh coal. We can also take coal from the Fairmont district that would be comparable in quality and price.

In the operation of our company we require steam coal, by-product coal, which coal is introduced into by-product ovens to make coke. And we require illuminating gas coal, such as is used in a vertical retort, bench gas and horizontal retort. These coals can be purchased from districts other than the Southern Appalachian fields, and in the purchase of coal the prices we would have to pay would be competitive with prices in the Southern Appalachian field.

(754) In the St. Louis district particularly, there has been quite a large development of natural gas lines out of Oklahoma, Texas and Louisiana. One particular line, the Mississippi River Fuel Company, has a capacity of about 120 million feet per day. That particular line has replaced a large volume of coal tonnage in that district. As a matter of fact, we ourselves are burning some natural gas under our boilers at St. Louis. I would say that the replacement there in our plants amounts to about 70,000 tons of coal. I am positive that there has been a substantial development along that line, particularly in the St. Louis district. I have a greater knowledge of that district, of course, than any other. This fuel is on a competitive price basis with coal. In my opinion there has been active and keen competition [fol. 571] in the sale of bituminous coal in the markets in which our company has purchased coal. I have not been here during the course of this trial. I just arrived this morning.

(755) In regard to interchangeability, I think the general public have had the idea that certain coals could only be used for certain purposes. I will give you a definite example: At our Granite City plant, when those ovens were built, everybody said, "Why, you can't use anything but Southern Appalachian coal." As a matter of fact, a rough estimate would be about 4 million tons of Southern Illinois coal we have coked in that plant. And then they said, "Well, this water-gas plant cannot use anything but West Virginia splint or Elkhorn coal," all of that being Appalachian coal. I will tell you that the Minneapolis Gas Company has used Western Kentucky coal very satisfactorily from the Green

River field. And it was well known several years ago that Elkhorn coal was the primary coking by-product coal of this country. Today, I only know of one or two by-product plants that use it. So they have gone over to Fairmont coal. It has replaced Elkhorn coal. For instance, at the Otis Steel Company and at the McKinney Steel Company, there are two plants that Fairmont coal has absolutely replaced Southern Appalachian coal.

The factors that entered into that replacement are, lower freight rates and lower prices. Price is an important factor in the interchangeability of coal.

(756) I do not know of a stoker plant that could not burn corn shucks if they got them cheap enough. There would need to be some adjustment of equipment but that is what we have our engineers for. There would be no expense involved in change of equipment. All you have to do is change your timing of your stokers. That involves half an hour or an hour's work.

[fol. 572] Assuming that the producers located in the Southern Appalachian region representing 75% of the present production of that region have subscribed for stock in Appalachian Coals, Incorporated, and have agreed to dispose of their coal through that selling agency, at a price determined by the agency, our company would be able to buy coal in the open competitive market. If their price was not in line with Pennsylvania or Fairmont or Ohio or Indiana or Southern Illinois, we would buy it from them. (757) Those are the producing districts where — are able to get that coal and where we are buying it now. Pennsylvania, for instance—I don't think I mentioned Pennsylvania—and that would be true if the price of Appalachian coal became too high for us.

In my opinion the probable effect of the organization of Appalachian coals upon direct commercial consumers of coal, the only real effects so far as the consumer is concerned, would be to give a certain stability to a contract that he might make. For instance, we are quoted by a great many operators that use cut-throat methods that we would not make a contract with on account of their responsibility. Such an organization as Appalachian Coals, Inc., backed by the leaders of the industry in the field, we would certainly feel perfectly safe in making a contract

with them. And there would be enough tonnage behind the contract to guarantee the performance.

My company is also a producer of coal. The producing companies that it owns are: the Utilities Elkhorn Coal Company which is located in the southern Appalachian district, the (758) Mount Olive & Staunton Coal Company in the Inner group district in southern Illinois producing the Number Six coal. They are wholly owned subsidiaries.

About 30% of the coal produced by mines owned by our holding company is used to generate power for the utilities [fol. 573] company. The balance of it is sold commercially. The annual production of the Mount Olive & Staunton mines since 1920 has averaged about 750,000 tons. The Utilities Elkhorn Coal Company mines have not been operating since 1920. The productive capacity of the Mount Olive & Staunton is about 5,000 tons a day and the Utilities Elkhorn about the same. We produce, I would say, practically all commercial sizes of coal. Domestic and steam coals.

(759) The coal from the Utilities Elkhorn mine in the Appalachian district has no superior in the district. However, the Mount Olive & Staunton coal is far inferior but there are certain compensating features about the location of the mine, etc. The Mount Olive & Staunton coal is interchangeable with the coal from the Appalachian district. The Utilities Elkhorn coal is identical to some of the Appalachian coal because it is located right in the district.

The coal from the Utilities Elkhorn mine is sold in Central Freight Association territory and over the docks in the northwest which extend in a radius from North Dakota to Iowa and then by tidewater to New England. I am familiar with the competitive conditions in those markets. In regard to competitive conditions in those markets, I find this, that the consumer of coal will buy coal at the cheapest price per thousand pounds of steam. In other words, if it is southern Appalachian coal he will buy it, if it is Indiana coal he will buy it. If it is strip coal he will buy it. All he is after is to make a thousand pounds (760) of steam as cheaply as possible.

I am not a member of Appalachian Coals, Incorporated, although I have a mine in this district. I was asked to join. We did not join because we put in these mines prin-

cipally to take care of our own business and do a general commercial business. Of course our wants come first. And we have to use that as a backlog tonnage for our own plants. Consequently we did not want any association control over [fol. 574] any of our properties.

We closed down one of the Elkhorn mines, because we found that we could buy coal for some of our plants cheaper than we could produce the coal on a delivered price basis. If we were making kilowatts based on the price of the cost of manufacturing kilowatts or if we were using it for compressor work we could tell what the steam cost was. We could buy coal more cheaply in the open market than we could make it at delivered price.

(761) Cross-examination.

By Mr. O'Brian:

The Utilities Elkhorn Coal Company mines are located in eastern Kentucky on the C. & O. Railroad, the Big Sandy division. That is in the Appalachian territory. The Mount Olive & Staunton mine is located in Macoupin County, Illinois, about 60 miles from St. Louis. We use very little of the Mount Olive and Staunton coal now for our own use because we have substituted natural gas for the use of our own coal. Prior to that we used the Mount Olive coal for generating electricity at Laclede Power and Light, St. Louis. We buy these various quantities of coal that I have described for use in different plants in different parts of the middle west and the east. So that freight rate plays a very large part in our consideration when we purchase it.

Not all of the Utilities Elkhorn mines are closed down.
(762) Number 5 and Number 6 are running. They are close to Pikeville, Kentucky. Number 6 and Number 7 and Number 4 and Number 3 and Number 1 are closed down.

(763) The 40,000 tons of Pennsylvania coal we bought for use at the plant of the Eastern New Jersey Power Company. The 25,000 tons from North Dakota was for use at Harvey, North Dakota. The 720,000 tons from Indiana for use at Indianapolis Power & Light, the 280,000 tons of West Virginia for the Laclede Gas Light and the [fol. 575] St. Louis Gas & Coke Corporation at Granite City, Illinois. The 770,000 tons from Southern Illinois was for use at Granite City for coke ovens. That is delivered

at Granite City. The railroads haul it in there on a regular established freight rate and we did something that people said could not be done. We used Southern Illinois coal for coking purposes instead of Eastern coal. The 650,000 tons of Appalachian coal from East Kentucky we use at the Laclede Gas Light at St. Louis, the Derby Gas & Electric at Derby, Conn., and some at Clinton, Iowa, and Rochester, Minnesota.

(764) The Corrigan-McKinney Steel Company at Cleveland uses the Fairmont coal. That is the only coke oven plant that I know of. At present the only point at which we are using natural gas under our boilers is St. Louis. We have been made some pretty low prices out in the Northwest and other places, however. But the only point at which we are using it is at St. Louis.

I am not interested in the companies that are defendants in this case. The Starling Coal Company does not belong to Utilities Power & Light. I am connected with the Starling Company in that the United Collieries Corporation is the selling agent for the Starling Company.

(765) I am president of the United Collieries Corporation. I can explain this better by saying that in a public utility company there are so many corporations that belong to the parent company that you are apt to become confused. I do not blame you for being confused. I am liable to be vice-president of this, and office-boy of that, but this United Collieries Corporation happens to be a subsidiary of the Utilities Power & Light, of which I hold the title as president.

The United Collieries is a selling organization. It sells Utilities Elkhorn coal, it sells the Starling Corporation, for instance. The Starling mines are located over on the L. & N. [fol. 576] They are not owned by the Utilities. The United Collieries does not represent or sell coal of any of the defendants of this case. The United Collieries is selling agent for the Paragon Elkhorn. (766) If they are defendants I did not know it because I recommended that they not join it. They consulted me as to whether to join the Appalachian Coals and I advised them not to do it unless all the mines we handled went into it because it would divide the house, so to speak. Part of our tonnage would be handled through the Appalachian Coals, and part of it would be han-

dled by ourselves. We told them if they wanted to join, we would be glad to give up their tonnage if they wanted us to.

I remember being interviewed by a member of the Department of Justice about this plan some time ago. The following is a substantially accurate account, in words, of part of what I said:

"Mr. Burton Keeney and Calvin Holmes, of Cincinnati, talked with me, and I told them it was necessary for some of the large companies to stay out, and, as we were one of the largest in the United States, we would. It was a friendly discussion. I told them they need not fear our cutting the prices."

(767) But if you want me to state the situation, this was a friendly discussion, and I was not on the witness stand. If you want me to charge my remarks with the exact intent, I will give it to you.

I would not definitely say that I told the Department of Justice agent that it was necessary for some of the large companies to stay out and that as we were one of the largest, we would stay out. I told Mr. Holmes and Mr. Keeney that they could not hope to get everybody in this Southern Appalachian; that I did not know whether our people would go into it or not; that I would take it up with them, and if they did not go into it, in my opinion it would be a good thing. [fol. 577] Because if we (768) did not go into the thing we would have a certain amount of tonnage free, of the best quality, to do what we pleased. That would not be controlled by the selling agency.

Redirect examination.

By Mr. Donovan:

We send some coal from our Elkhorn mine into the Carolinas. We sent a little bit in last year. We have sent some in this year but not as much as we did last year, however. The potential capacity of the Utilities Elkhorn Company mine is (769) around a million tons. We use a little bit more than that for our own company from these particular mines but the rest is available for commercial uses. Taking the total tonnage from all the mines the amount we use in our own companies equals about 30%.

Recross-examination.

By Mr. O'Brian:

On a rough guess I would say that the Utilities Elkhorn in 1929 produced around 650,000 tons. The coal that was sent into North Carolina went to the domestic coal dealers down there and some to the cotton mills.

(770) I would guess there was about 35,000 tons sent in there from April 1, 1929, to April 1, 1930. Last year I would say about 15,000 tons was shipped into North Carolina.

By Mr. Donovan:

If the price went up in North Carolina, we would send our coal down there.

JAMES D. FRANCIS, a witness for defendants heretofore sworn and examined in chief and in part on cross examination, resumed the stand for further examination, as follows:

[fol. 578] Cross-examination resumed.

By Mr. O'Brian:

(771) To North Carolina, the part marked 4 on defendants' Exhibit 9, the Smokeless fields have a freight rate advantage of 20¢ a ton, under the Coal Creek 10¢ a ton; that is, the freight rate is 20¢ a ton less than Coal Creek, but 10¢ a ton less than that part of the Appalachian region in West Virginia. That is, on the Norfolk & Western and Chesapeake & Ohio railways. So that Smokeless has an advantage of 10¢ from some fields and 20¢ from other fields. I think that the reason we have been able to ship so much coal into that part of North Carolina in competition with Smokeless was due largely to price competition.

Unquestionably every seller was a factor in the price competition including the 77 defendants who were competing for business in that territory. (772) But if you mean by that that if this organization, or if 77 shippers sold through Appalachian Coals, Incorporated, that that price competition would be eliminated, that is not a correct assumption.

Q. Well, let us get it straight any way you want it now. I do not want to misquote you, Mr. Francis. But my question is this: There were 77 of your defendants competing for business in 1929 in North Carolina in the part numbered District 4. They were competing with each other and with Smokeless operators, were they not?

A. Yes, and a host of others.

Q. Yes, and a host of others, if you choose to put it that way. But the host of others did not get any business.

A. Well, I don't know about that. I don't think either of us has any figures as to how much business the 77 got and how much the non-defendants got.

Q. Well, they are not a host.

A. Well, that is a matter of opinion.

[fol. 579] Q. Is it your view that when that conflicting desire to sell is eliminated, that is to say, as between each other, these 77 defendants competing actively for business; that with that eliminated and the power to fix prices vested by all of them in the sales agency, that would have no effect whatever on prices in that market? Do you understand my question:

A. I think I do.

Q. All right.

A. I think that the joint selling to the extent that (773) it eliminates dumping and sacrificing coal on consignment, may have a tendency in that market to sell coal in a more intelligent way. But I do not think that this agency is going to restrict the tonnage it can sell in that area. This agency can not do business for those producers unless it retains its volume, and it must make whatever price the competitive market is in order to retain its volume.

Then there is another thing and I think I have made it clear, and I did not want to repeat my direct testimony too much: That there will remain competition between producers selling through Appalachian Coals, Incorporated. There will be price competition.

This was discussed in our meetings, and it was an important consideration: Producers having various grades of coal, if all grades of coal for steam purposes were offered at the same price, a man having the lowest ash as well as lowest sulphur and highest heat units, would get all the business first, and the mines or producers of coal—

to start out with, say, four per cent ash, they would get all. (774) (a) So those with low ash would get orders up to their capacity, and a mine with an average of 8% ash would get no orders.

Now, in discussing this matter at the Cincinnati meeting, at all the Cincinnati meetings, it was understood that there would be an inspection department to properly relate and figure out the relative values of coal, and that the man with 8% ash coal would have a price made on [fol. 580] his coal delivered that would allow it to move freely in competition with the mine having 4% ash coal.

The selling agency has the power to fix the price for each grade. But it will be a fair price to be governed by competition in the market, and a price that will allow the coal of all the producers employing Appalachian Coals, Incorporated, to move their product, otherwise some coals might not move at all.

(774b) It is not our purpose to eliminate any production that can be sold but it is the purpose not to ship coal that is not sold into the market that can not consume that.

(777) Excess production was not one of the evils that this plan was aimed to eradicate. It was not expected that this agency in any way would have any retarding influence on production. On the other hand, it was the purpose of this agency to produce and sell as much coal as it could sell regardless of the capacity of the mines. Now excess capacity exists today. We have excess capacity of double—almost treble of what we are producing at our individual mines.

Distress coal is a result of producing coal and (778) shipping it at a time when there is not a demand, but that does not come about due to the excessive capacity. It comes about due to a number of causes. One of the purposes of this plan was not to put coal on the market until there was a demand for it. And there would be no object in the producer producing the coal then for the market until the selling agent gave the producer the order. But coal is not like most other manufactured commodities. Coal, the order for which is received this morning, can be shipped this afternoon from most mines. It is a daily process. It is just a matter of a few hours.

It is (779) one of the purposes of this plan not to send coal on the market for which there is no demand and dump

it regardless of the market demand and conditions. So far as our members are concerned, this plan is designed [fol. 581] to prevent that being done. The purpose of getting as much as 70% in order to make the plan effective was that that would, as far as the dumping and the shipping of coal on consignment was concerned, and thereby creating an over surplus of coal in excess of the market demands, that having as much as 70% that did not engage in that cut-throat practice would alleviate the situation. Not cure it, but would result in a healthier situation in the industry.

(780) If the agency had 50% or 60% of the tonnage to sell, it would alleviate the evils to which I have referred to a very great degree and a number of the producers said 50% would be sufficient. But as I have testified, it was decided that in order to be effective, the plan should have not less than 70% and not more than 80%. (781)

The ability to control production of 70% and upwards was not for the purpose of fixing the price of coal, but it was felt by all of us that the elimination of the dumping of coal, shipping coal on consignment, and the various other factors referred to in my direct testimony, with that large quantity of coal, would prevent cut-throat competition, and might result, and we hoped would result, in us getting a better average price for our coal than if that cut-throat competition and that dumping of coal continued. That may not mean a higher price, or it may mean that the price would not decline as much, but all the time we had in mind that we could not gauge the result, because of the competition of the outside coals in the same region, and other regions, and that we would have to meet that at all times.

We did feel that competition in the local district was necessary, outside of the competition between the people employing Appalachian Coals, Inc., that we would have competition between ourselves to the degree I mentioned a while ago, as to quality, but our counsel advised us that there ought to be substantial competition remaining in the Appalachian areas, and especially in the Markets of North and South Carolina and (782) Georgia, to take care of the requirements of those markets by coals other than the [fol. 582] coals produced and handled through this agency.

Counsel did not say 80%. Counsel said there ought to be enough to keep enough coal on the outside of the agency to supply all the markets that are most dependent upon this area. They did not fix the percentage. The meeting fixed the percentage.

The Island Creek Company plans to have our present agents designated as sub-agents of this selling agency and we may have others designated. Under our plan as printed, each of the defendants subscribing for preferred stock is entitled to name its own sub-agents to the selling agency—one or more sub-agents. Practically all of our defendants have indicated their intention of each one appointing one or more sub-agents to act under the direction of the selling agency. There are a few of them who have said that they have nobody they desire to designate and Appalachian Coals, Inc., could sell that direct, or designate a sub-agent themselves.

(783) The economy in that arrangement is practically to be realized over a period, as the organization of Appalachian Coals, Inc., would be built up, and the advantage is partially in that for the same money we can get a better service and a better representation.

In the immediate future, we will spend about the same amount of money as we have in the past. I would expect that after a year or so of operation, with the organization perfected, that economies would be introduced that would begin to cut the costs, but it will take some time.

It is true that the selling agent under our plan is to guarantee to each of the producers the account of the creditor to whom the sale is made. That is the custom and has been the custom of selling agents. The sub-agent will also guarantee the account to the selling agent. They are [fol. 583] responsible for the collections. (784) So that both the selling agent and the sub-agent will be deeply interested in the question of the credit standing of the purchaser. I do not have in my files any copies of the contracts of selling agencies which have operated in the past. I gave some of them to counsel.

I have only had personal dealings with two: the North American Coal Corporation, of Cleveland, that sold, on two different occasions, the output of the Landstreet-Downey Coal Company, one of the defendants. They had a tonnage of some 10 million to 12 million tons, according to

their representations to us. The other one was the General Coal Company of Philadelphia, and they also had about a like tonnage. The contracts were not identical in form with the contract which is involved here; that has been entered into by the defendants.

(785) The Island Creek Coal Company in 1927 shipped in Lake shipments in excess of 2½ million tons. The larger producers of course, produce much the larger amount of coal, in the matter of percentage. As to the tonnage going to the Lakes, I do not know as to that. I do know small producers ship coal to the Lakes.

Redirect examination.

By Mr. Donovan:

That is the way we expect to have the small producers with us. I know a small producer, a neighboring mine half a mile from our mines today, with a production of 8,000 or 9,000 tons a month, that is sending about 90% of its coal to the Lakes every month.

In regard to selling agency contracts, (786) in all the cases I know of, the selling agency guarantees the credits.

The question of limitation of production was discussed freely at the New York meeting. It was determined at [fol. 584] that (786) meeting that it could not be limited legally, and even though we had no Sherman Law, that it could not be limited practically. By that I mean that the shippers of coal and producers of coal would insist on shipping as much coal as they could.

It is not contemplated in this Appalachian contract that there will be any reduction in shipments from the Appalachian region. I want to add there, that this question of shipments is one that is before this region, and has been for years, and while we are apparently, from these tonnage figures, strongly entrenched, and do have a large percentage of the business in some of these northern markets, we have (787) constantly feared that we were going to lose those markets to the producers in competing fields north of the Ohio River.

In regard to the competition from Ohio producers in our Eastern territory, on Defendants' Exhibit No. 2, page 5, is shown shipments all-rail to the Lower Peninsula of

Michigan. It shows that in 1929 the Appalachian region shipped to Michigan 14 million-odd tons of coal; and that they shipped—that that tonnage dropped, in 1931, to 8,800,000 tons, or from 73.7%, to 68.11% of the total shipped to the Lower Peninsula of Michigan.

As compared with the State of Ohio, that reflects the situation in numerous markets. Now, it does not reflect the situation in every town. Ohio competitors have not been as successful (788) in some towns, and cities, as in others. But that same exhibit shows that in 1929, the Ohio districts, all of them combined, only shipped to Michigan, 750,000 tons, and that their tonnage in 1931 was 1,050,000 tons, and that their total of the entire shipments to the Lower Peninsula of Michigan increased from 3.86% in 1929 to 8.11% in 1931, or that they more than doubled their percentage of the total coal shipped.

We think it is very significant that while the general production of coal is rapidly decreasing, yet the production in Ohio should remain nearly stationary, and that they could go into the markets in a greater percentage than we could.

[fol. 585] The fact that there is but little coal coming into Michigan from Ohio as compared with coal coming from our region does not indicate that Ohio is not a competitor in that region. In any region we may have very strong competition and our price may be made by that competition where the competitor fails to sell. In other words, the mere fact that coal is not in there (789) does not indicate any lack of competition in that market.

I cannot conceive that there is any possibility of cooperation between the Smokeless field and our tefritory, because there are different sets of producers aside from our own company which has only an interest in the Pocahontas field such as that of managing—. So far as I know, we are the only one that has a substantial interest in the Smokeless field. There may be—well, there are one or two others that have an interest in the Smokeless field. The Majestic Collieries Company. I do not know that the company has any interest there, but the owners of the Majestic Collieries Company have an interest in the (790) Smokeless field, but it has no substantial connection. And the Smokeless producers, as a whole, are very jealous of what they consider their advantages in the market over the high

volatile coals, and knowing the Smokeless producers, and being engaged with them for years, I cannot conceive of any working arrangement on markets with the Smokeless region.

Q. I understood Mr. O'Brian to ask you the question, whether the Cincinnati meeting felt or expected that there would be restraint of trade as a result of this agency agreement but that it would not be illegal if it were not in excess of 70%.

A. I did not understand it in that way, if that was the question.

We did not consider that this agency contract would be in restraint of trade at all. We only considered that it could be, having the larger tonnage, of use to prevent the [fol. 586] various abuses that we (791) have gone over, and could alleviate our conditions to the extent that we could eliminate those abuses.

But we hoped in this organization not to restrain trade, but to promote our business, to be better able to compete with the producers in the other competing fields.

Here is our situation: We are at a disadvantage to the most of our principal markets in the matter of freight rates. Now, for a number of years we had an advantage in the preparation and the quality of the coals, due to better preparation, screening and sizing.

Now, that has been changed by reason of the fact that the Northern fields improved their preparation and sizing.

We had a lower wage scale, and we partially met this competition by the fact that we had a lower wage scale. The fact that the district had a freight rate differential, was recognized by the Union, the United Mine Workers' organization, in making wage scales in the Kanawha district, because of the fact that they did have to meet those things.

Now, today, there are no uniform wage scales in the Northern fields or the Southern fields. And wages being made in the Northern fields are as low and in many cases lower than the wages being made in the Southern fields. They are not uniform. One company may pay considerably higher than another in that field. You cannot strike a balance.

But we have been very fearful for the last three or four years that, with that condition existing, we were going to lose in competition a very substantial amount of our business. And we hoped that, with the larger volume of coal, better (792) ability to reach the consumers, we could to some extent hold more business that we feared was going to the other producing districts.

We have had constant conferences with our railroads, and have tried to impress upon our railroad traffic vice-[fol. 587] presidents and presidents the necessity of their helping us to meet this situation by lower freight rates. But we have accomplished nothing along that line.

(793) Referring to the tendency of mines to increase in size, in the matter of capacity, in the main the capacity already existed. The free transportation supply has allowed us to make use of the capacity that was there, and in many cases where a company has a large number of mines, to shut down a few mines, and increase the capacity of the other mines. (794) There is centralization of buying power but I could not say that that would cause a tendency toward increase in the capacity of the mines. I do not think that that is the result of the centralization of buying power, if it exists. Our company, the Island Creek Company, has made a profit during the last five years. We have some advantages over the other producing companies in the Appalachian region that I think are very material.

Island Creek Coal Company was fortunate in locating its properties in a thick vein of coal with exceedingly fine mining conditions, and with, you might say, a minimum of impurities in the coal, all making for cheap mining. Splendid roof conditions. And that went for a lower cost. The properties were acquired at a low value, and are carried at a low value. Our depreciation account is carried at about 3½¢ a ton—our depletion account—(795) as compared with the usual royalty in the district of from 8 to 10 cents or more per ton where coal is leased.

Our company owns a retail distributing company in Cincinnati which has made a profit for all of these years, and which is included in this consolidated report.

We own a river transportation system that has earned a profit, that has given us outlet for tonnages that we would not have otherwise been able to dispose of, and gave us

some advantages over competing producers. That is also included in these earnings—the earnings from that river [fol. 588] transportation department.

We have also at the mines a stores and merchandising department that has earned considerable money from the sale and merchandising of goods that do not come from the mining and sale of coal. And our company has had a considerable income over most of this period from securities owned by our company from investments, that is also included in these earnings. These earnings do not come entirely from the sale of coal. We have a substantial amount coming from other business than the mining and selling of coal.

It is considered in the trade that these advantages that I have recited mark our company as exceptional among the other companies operating in our region.

(796) The figures I gave this morning in Exhibit 5 do not make any allowance for interest on investment. There is no charge or anything going into the cost. The only item that might be considered in that category is the depletion and depreciation account. That is merely to retiring capital investment and not as interest on the investment. We have no bonded indebtedness and there is no interest charge in our cost.

(797) In regard to unfair methods of competition, I would not say there was any fraud. While there may be some misrepresentation—and we are not charging any fraud—misrepresentation as to qualities of coal and suitability of coal and uses of coal, you get that in every industry.

(798) When I speak of dumping and distress coal I do not mean entirely the same thing.

Distress coal is coal that has already left your mine and is likely to get demurrage or is on demurrage. Dumping may consist of offering coal that you have on your tracks at below or way below the market price in order to get immediate movement for it. Now that was growing out of the making of these many grades. You will say, "Well, [fol. 589] I have got to run the mine tomorrow, and the day after tomorrow—" "And so I will sell that regardless of what it is worth." Now that is what we call dumping.

There are figures indicating the amount of such coal.

They are available on the railroads. They have not been produced but we can produce them. They are in two forms. The amount of coal each railroad has at billing points unconsigned daily is available to producers and consumers, and the amount held at the mines. I can give you an approximation, but we will furnish the figures by another witness.

(799) In regard to limitation of production, it is true that we have to make some arrangements when we have made this selling agreement with the selling agent for the amount of coal which each producer was to be allowed to sell, provided, of course, that there was not enough coal to satisfy everybody.

(800) That is set out on page 27 of Exhibit "A", wherein it says that in the event the demand is not sufficient to operate the mines of all producers upon a full-time basis, then the participation of the producer in the total sales of the selling agent for the first calendar month, shall be such percentage of the total sales made by the selling agent for that month that the total car allotment of the producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the selling agent; and then there are like provisions made for the future.

That provision may limit the production of one producer and give more production to another producer. We are one of the big profitable companies. (801) If we were not under this restriction we could produce any amount that we could sell. Under the selling agency contract the production is limited in the aggregate to the amount that can be sold.

[fol. 590] By Mr. O'Brian:

Referring to the earnings and profits of the Island Creek Company, the statement does not show our income from our transportation system or from interest on investments, but even if the allowance were made, the statement still would show a profit on coal for each of the years so that the effect of those two or three items that I referred to would be to reduce the profit on this statement attributable to coal alone.

By Judge Northcott:

(802) Assuming that the membership in our agency reached 80% of the production, under the present plan the policy is not to allow in excess of 80%. Assuming our agency becomes successful and there were a general movement to get in and contract with us—get in under the umbrella—when we reach 80%, unless we changed our plan, we would have to refuse to accept contracts from any other producer.

By Judge Soper:

There is nothing in defendants' Exhibit A, attached to the answer, which binds us to the 80% limitation. It is a matter that could be changed by an action of the stockholders or the board of directors. (803) My recollection is that the limitation was adopted by resolution at the meeting of the stockholders of Appalachian Coals, Inc.

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(804) J. M. Dewberry, a witness called on behalf of Defendants, being first duly sworn, testified and states as follows:

Direct examination.

By Mr. Donovan:

My name is J. M. Dewberry, and I am General Coal and Coke agent of the Louisville & Nashville Railroad at Louisville, Kentucky. My duties as general coal and coke agent [fol. 591] are the general supervision of the coal and coke traffic of the company, the making of rates thereon to move it to market, and generally to promote its movement in every way I can to all corners of the country. I am a member of a committee appointed by the president of my company to supervise purchases of coal for the company's requirements.

The company's fuel purchases are handled by a committee consisting of the general manager, who has charge of the operating department, the general purchasing agent, and the general coal and coke agent, myself. This committee is presided over by the president of the company himself.

(805) I have had more or less to do with the purchase and shipment of coal for a great many years and in the last few years I have had a more direct contact with it, due to my membership on this committee I have mentioned.

The Louisville & Nashville Railroad has mileage in all of the Southern States, except West Virginia and South Carolina. The consumption of coal by the Louisville & Nashville Railroad, of course, goes up and down with the volume of its traffic. Normally, I should say that the company requires from 3 and a half to 4 million tons a year, possibly 4 and a quarter million tons, in order to operate its service.

I think the present contracts call for a minimum of 2,100,000 tons, and a maximum of possibly 3 million or 3 and a quarter million tons. In actual figures this year, it will be somewhere between those two figures, depending upon the traffic we have to handle.

We buy coal in the McRoberts and Elkhorn and Hazard districts of Eastern Kentucky, in the Harlan and Jellico and Middlesboro and Pineville districts of Southeastern Kentucky; in Southwest Virginia, East Tennessee, in the two subdivisions (806) of the Western Kentucky field; in Illinois, and in Alabama. We can use the coals of all these [fol. 592] various fields interchangeably for our purpose with one exception which is probably of no importance. That is in the Alabama field, for one coal, which can be used very successfully by itself, produces unsatisfactory results when mixed with other coals from the Alabama field. We do use that coal by itself successfully. We can use different seams of coal in these various fields. In the Hazard and McRoberts fields of Eastern Kentucky, we are using satisfactorily coals out of probably six seams. In Southeastern Kentucky regions, including the Jellico, Middlesboro district, we are using coals out of probably seven or eight seams.

We can purchase coal from fields other than the Southern Appalachian that could compete with the Southern Appalachian in kind and quality. Those fields would be in Western Kentucky, Illinois and Alabama.

Our company does not own any coal mines.

(807) So far as our own company's uses are concerned, there are no substitutes, with the possible exception of oil, which we could use on the south end of our line, embrac-

ing possibly one-third of our mileage. Fuel oil is available in profusion around the Gulf ports. We serve three Gulf ports, Mobile, Pensacola, and New Orleans. We could equip our locomotives with oil-burning appliances, and use oil in our shop work. But there has never been any necessity for it, as long as we could get an abundance of coal. And now for that purpose you have natural gas, and also hydro-electric power.

It is easy to obtain oil all along the Gulf and we serve directly with our own rails the important Gulf ports of New Orleans, Louisiana; Gulfport, Mississippi; Mobile, Alabama; and Pensacola, Florida.

[fol. 593] I have prepared a chart which shows the productive capacity of the mines on the Louisville & Nashville Railroad in Eastern and Southeastern Kentucky, separated as between defendant and non-defendant companies.

Whereupon defendants offered in evidence the chart showing the productive capacity of mines on the Louisville & Nashville Railroad in Eastern and Southeastern Kentucky, separated as between defendant and non-defendant companies. It was received in evidence and marked Defendants' Exhibit #18.

(808) This statement was compiled under my direction from the official bulletin issued every month by the railroad company, showing the cars furnished, the cars loaded, and the ratings of the different mines on the Louisville & Nashville System.

Sheet No. 1 has to do with the rated productive capacity of defendant companies operating in the Cumberland Valley Division of our line. With respect to active mines, the mines of defendant companies have 48% of the productive capacity of that division (809) and 5% of the inactive mines. The meaning of the term inactive mines is largely a matter of individual interpretation. I have no rule to go by except to take the mines that were actually rated for car supply on the 10th of July, 1932.

That rating is made in this bulletin to which I referred as the source of this information. Now, as to which of these mines are active, and which are inactive, the only safe rule I could go by was to consider as active mines those that actually loaded cars in the month of June, 1932,

and as inactive mines, those which did not load coal in that month.

Inactive mines are those with tested productive capacity which could be opened at any time that the demand required it. The reason they are considered open now is that it is so considered as long as they have a rating. We [fol. 594] drop them out of our rating list when we have definite information that they are dead, you might say. This term "inactive" does not mean that they are dead mines. They are mines standing there equipped to furnish coal, and could furnish it tomorrow if they could fined a buyer for it.

The total productive capacity of defendant companies on this division would be roughly (810) 53%. Sheet No. 2 shows a productive capacity of non-defendant companies on this Cumberland Valley Division of 36%. That is active. 11% of the productive capacity of non-defendant companies are represented by inactive mines. The total productive capacity of non-defendant members on this division is 47%.

The Cumberland Valley division, covered by the first 3 pages of this exhibit, serves the Harlan field, the Pineville field and the Middlesboro field and also the St. Charles and Appalachian districts of Southwestern Virginia.

Taking the Eastern Kentucky Division, which serves the McRoberts or Elkhorn or Hazard districts of Eastern Kentucky, the productive capacity of the active defendants is 48% of the total productive capacity of the Division. (811) The production of the inactive defendants on the Eastern Kentucky division is 5%. And the production of the active and inactive non-defendants is 47%. In other words, the percentage divisions as between the defendants and non-defendants is the same as on the Cumberland Valley Division.

Now on the Knoxville and Atlanta Division, which serves the Jellico district of southern and eastern Kentucky and east Tennessee, the La Follette district of east Tennessee, and the Windrock district of east Tennessee, the total productive capacity of the active defendants is 52% of the whole division. Inactive defendants, 10%. Making a total for the defendant companies of 62%. And the active and inactive non-defendant companies 38%. That is in the [fol. 595] Knoxville and Atlanta Division.

Now assuming that producers located in the southern Appalachian region and representing 75% of the present productive capacity of that region have subscribed for stock in Appalachian Coals, Incorporated, and have agreed to dispose of their coal exclusively through that agency, and at a price determined by it, in my opinion I will be able to buy coal for the use of our railroad in an open competitive market. (812 I have a number of reasons for that opinion.

Coal is in profusion in all of the districts that we serve. And the mines which are not members of this organization are fully equipped to furnish us with an abundance of perfectly satisfactory coal for our purposes. In addition to that the Louisville & Nashville Railroad, even without regard to its allied companies who consume considerable coal, have had a tremendous purchasing capacity. In other words, even the small amount we are taking now, 2,100,000 tons, would give employment, very desirable employment, to a number of mines, so that with that opportunity to furnish employment to a number of mines in these various districts I do not anticipate the slightest difficulty in getting all the coal that the Louisville & Nashville needs in these very districts without subjecting it to the necessity or inconvenience of going into some other district to get equally satisfactory coal, which it can do.

I will say that if Appalachian Coals should be successful and should desire to fix a high price, I would be able to get my coal at a reasonable price from non-defendant producers. I will go a little bit further and express the confident opinion that we can get all we want from the defendant members as well.

[fol. 596] One fact that has been left out of this program or plan, or whatever you might call it, is the tremendous, highly organized and concentrated buying power that can be exerted today. Now I have reference to that thing not merely with (813) regard to the Louisville & Nashville Railroad, but consumers in general. It is a well known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far-reaching than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about the Appalachian Coals, Inc., or somebody else dictating

the price that they are going to pay. They dictate their own price.

The purchaser makes it. And he makes it because of the tremendous force and influence of his buying power. Why, it is nothing these days for one interest or one concern to buy several million tons of coal. I have just given you one example of it in the case of the Louisville & Nashville Railroad.

Now here is another factor that enters into this thing. It is a fact that every member on the Louisville & Nashville Railroad who is a member of this organization can sell coal to the Louisville & Nashville Railroad cheaper than he can sell it through your Appalachian Coals, Inc. To explain that: He does not need a great flock of salesmen to sell coal to the Louisville & Nashville Railroad. It is a very simple matter. We know what coal he has. We have tested it out and we know whether it is satisfactory for our purposes or not. Now it is a very simple matter to come to an agreement about the quantity and preparation and the terms of delivery. Now when he sells it to us he saves the commission that he is going to pay to you if you sell it. So that out of the identical price made by you or by him his realization would be greater if he sold his coal direct us (814).

I think that the organization of Appalachian Coals, Inc., [fol. 597] would be beneficial to the railroad and to the buying public in general, in this way. Start with our own situation first. In these days of railroad operation service is paramount. Now in the performance of that service coal is paramount. You have got to have good coal to run your trains properly. It costs (815) the Louisville and Nashville Railroad a great deal of money to maintain inspectors, and tests, and things of that sort, from one end of the line to the other, to see that we get the kind of coal that we require for our division and that our contracts entitle us to call for. With an organization like this, and with the honesty and integrity that should go along with it, the Louisville and Nashville Railroad can depend on Appalachian Coals, Inc., or any similar organization, to take a great deal of that burden and expense off its own shoulders.

I do not think that Appalachian Coals, Inc., could raise the price a cent. Not a cent. I do not think that in normal

times any selling agency, whether it is Appalachian Coals, Inc., or any one similarly organized, would be able to dictate the market price. It cannot do it, never has done it, and never will do it.

It comes back to what I have just stated, about this highly organized buying power. The Louisville and Nashville Railroad can go into any one of these fields and buy any one of the mines that it wants to today, and almost at its own price. There is an abundance of coal. That is one way of protecting itself, aside from this other method I just mentioned.

Another thing. Assuming that, due to the operation of Appalachian Coals, Inc., or to any other reason—the natural (816) operation of the law of supply and demand—that the price did go up. That is no calamity. The Louisville and Nashville Railroad is perfectly willing to pay a fair price for its coal, and it has a very selfish reason for doing [fol. 598] that, which I can explain. There are so many ways of protecting yourself against an unreasonable price on coal that it does not give me the slightest apprehension whether this plan of the Appalachian embraces 75% or 100% of the production on our railroad.

I think that there is enough coal in there so that it would keep the price within reasonable limits if there should be any attempt to raise it.

Cross-examination.

By Mr. O'Brian:

In my exhibit I have included captive mines among the non-defendants. And in figuring my percentages I have treated the captive mines as non-defendants. I do not know anything about Exhibit 3. I never saw it and am not possessed of sufficient personal information to say whether or not the Utilities Coal Corporation, of Lyle which I have marked as a captive mine, is a captive mine or not. (817) Three of them I absolutely know. I have marked just those that I know. The explanation is shown on the front page. The captive mines are indicated by a sign. Those mines are located on the Cumberland Valley Division. Take the Wisconsin Steel Company, No. 1. That mine belongs to the Wisconsin Steel Corporation, which is an ally of, or

affiliated with the International Harvester Company. The United States Coal and Coke Company Lynch mine is a mine of the Illinois Steel Company. I know that of my own knowledge.

The King Harlan is a mine of the Detroit Edison Company. The percentages that I have shown here as between the defendants and non-defendants would be somewhat different if you were to deduct the captive mine capacity from the non-defendants; but what I did was to take (818) every mine shown in this official bulletin of ours and check off those shown as defendants and make the separation on that.

[fol. 599] B. W. WHITFIELD was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I am in the coal mining business, and am president of the Harlan Collieries Company. That company is located about five miles above Harlan on the Clover Fork River. The railroad that serves our company is the Louisville & Nashville. (819) The other mine is in Knox County on the little A. J. Railroad.

The approximate average production of our mines since 1920 has been about 250,000 tons. Our greatest monthly production was nearly 50,000 tons. I think the biggest yearly production we had was nearly 370,000 tons. We could produce more than that. I think we could have produced 600,000 tons. In order to do that we would have to make very little expenditure for equipment. We would have to add a few mining cars. I suppose the mining cars could be delivered in 60 days to 90 days.

In addition to the Harlan Collieries Company I operate (820) the one on Brush Creek, the Kentucky-Jellico Coal Company that is on the Artemus-Jellico Railroad in Knox County in the State of Kentucky. It connects with the Louisville & Nashville at Artemus. This company has had a very short time of production. Last year was its first year of production and we put out about 70,000 tons. The

present capacity of that mine is about 150,000 tons a year. That could be increased by about 200,000 or 250,000 tons. It would not take a great deal to increase it to that amount.

Neither the Harlan Collieries Company nor the Kentucky-Jellico Coal Company has subscribed for stock in Appalachian Coals, Incorporated. We were requested to [fol. 600] join Appalachian Coals, Inc., (821) but we did not join because the people who were selling our coal at the time did not want us to go into it. We were dealing with a selling agency, the Commonwealth Collieries Company. That agency had other mines that it was selling for. They told us when I spoke to them about it that they would not be interested in joining Appalachian Coals, Inc. Another reason why I did not go in was that the amount of money that would be necessary to put up if I went in it without the selling organization. The coal from both our companies was sold by the same selling agency up to a short time ago. From my experience I can say that it is customary for the mines there to sell their coal through selling agencies. (822) Most of them do. That is true in my case because I do not think I am a salesman and I feel that these other people could do better by it than I could. I have dealt with more than one selling agency.

I do not know how many companies are usually represented by a selling agency. It is rather hard to say. At one time the company that I was with in Harlan had six or eight companies, or more, in Harlan County, and they were selling also for companies not in Harlan County, so I don't know just how many they were handling.

From my knowledge of the organization of Appalachian Coals, Incorporated, and its proposed operation I do not think it would hurt my business. I think that I can mine coal as cheap as the mines that they will sell for, and then the other is a matter of the quality of the coal, and I suppose the ability of the salesmen to make the sales, and I am satisfied with that selling agent. I do not think that Appalachian Coals, Inc., could wage any destructive war against the companies which I own or against the companies in my territory. (823) I think that Appalachian Coals, Incorporated, would in a way help the bituminous industry. [fol. 601] By having a number of mines, I think the coal could be better distributed. A commercial mine running

on making several grades of coal can rarely ever ship out every day the entire production. They nearly always are long on some grades and short on others, and by being able —I think it might be possible, if one mine had slack standing today and another one over here was short on slack, to swap around that way and keep the demurrage coal off the market—that is, I mean coal that is going in distress—off the market.

Our coal is sold in the States north of the river, that is, Ohio, Indiana, Illinois, and Michigan, and some in Iowa; and we also sell some into North and South Carolina and Georgia.

We are able to go into North and South Carolina with the freight rates against us. We sell some there at the present time. In the event that the price of coal should be raised by Appalachian Coals, Inc., in that territory, we would go in there (825).

Referring to Government's Exhibit No. 3, the companies in my territory who have not contracted with Appalachian Coals, Incorporated, produce 1,948,000 tons. That was a very low year. I know approximately the productive capacity of those companies. It would be double 1,948,000 tons or more. That is from the Harlan district alone.

I think that the non-defendants in Harlan County and Bell County would be able to supply the normal consumptive needs of the Carolinas and Georgia, there are a number of non-operating mines there that are not listed here. (826) There are 10 mines listed in the Harlan field which are not in operation that would have a capacity of about 1 million tons a year.

[fol. 602] Cross-examination.

By Mr. O'Brian:

I am not a member of the committee that was appointed by Mr. Bradley to organize the Harlan field. If defendants' Exhibit B gives my name as a member of that committee, I did not know it. If I have been on any committee I am not aware of it. (827) I was not notified that I was appointed on any committee. I was not present at the meeting. I have not taken any part in this matter. I was at a meeting in Cincinnati, probably two meetings.

I don't know how many they may have had. One I think was in October, and another one I think in January. I cannot recall the dates. For the reasons I have already stated here I decided not to go in on the plan.

I have been producing and selling coal for over forty years. I was in Alabama for a number of years. But I have been mining in Kentucky since 1918, and the most of that time our coal was sold through one agency. (828) In making my decision I was somewhat influenced by the fact that I was being satisfactorily treated by my present selling agency.

Charles A. Albright, another witness called on behalf of Defendants, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Donovan:

I live in Cleveland, Ohio, and am president of the Albright Coal Company. That company is a distributor of coal in greater Cleveland. We deal in bituminous coal. The amount of bituminous coal sold annually at retail by my company since 1920 has varied from 25,000 to 40,000 tons a year. (829) That coal is purchased in Pennsyl-[fol. 603] vania, Ohio, West Virginia and Kentucky.

We have no retail coal association in Cleveland. We have a Retail Coal Dealers Board of the Chamber of Commerce, of which I was the first president, and continued as president for seven consecutive years. But I am not president now.

We also buy coal from the Appalachian district. The coal we are buying now is coming from the Hazard No. 4 seam around Hazard, Kentucky. At various times we buy from other districts. We can buy from other districts than the Appalachian field at a price which is competitive, coals of a grade and quality equal to that obtained from the southern Appalachian field. We can buy coal in Ohio and western Pennsylvania, particularly coal on the Rochester & Pittsburgh Railroad. And in the thin vein Youghiogheny, over around Pittsburgh, on the Pittsburgh Terminal, and up on the Youghiogheny River. (830) We can also buy coal

comparable for household use with the Appalachian Coals in the Hocking Valley in Ohio.

I would not term the competition that I have found in the markets where I buy my coal as mildly as keen. It has been almost trade warfare. It seems that every field and every district is trying to get a larger percentage of the business in Cleveland. That is the market where I sell my coal. That is, in greater Cleveland. That includes Cleveland and its suburbs, probably three-fourths of Cuyahoga County.

I think that Cleveland is the largest consumer of natural gas of any city in the world. We have three mains from West Virginia, and that is augmented by large producing fields within 50 miles of Cleveland. We have not had a gas shortage in Cleveland, to my knowledge, for over 5 years. The Standard Oil Company of Ohio have a refinery there, and they bring in oil and petroleum by pipe lines; and the Shell people are bringing (831) it in by boat. We have plenty of competition from all. However, oil has not made [fol. 604] much headway in Cleveland, because natural gas seems to be more satisfactory.

Coal is making a battle for the business, and we think we are making connections. We also have a factor in there now, which is the coke proposition.

(832) Our largest source of coal is from the Pocahontas field. We sell 85% to households and apartment houses and buildings. Probably 15% to small manufacturers who only use it for heating purposes. In our city I think that about 90% of the power is furnished by our municipal power company and the Cleveland Electric Illuminating Company. Most of the plants up there have abandoned their own power plants and gone to the other power.

I saw something in the newspapers that emanated from Columbus in connection with our State Administration up there urging state institutions and others to use Ohio coal. I haven't come in any direct contact with it, personally.

Assuming Appalachian Coals, Inc., could be organized in the way I have heard you describe, I have no fear of buying in an open competitive market.

(833) I think that an organization of this kind would probably give the average retailer a more stable supply of coal. That is, he would get more regular shipments and have his business taken care of in a more satisfactory way.

In our city the price I do not believe could be raised a cent because the value of coal is relative. The consumer is buying not coal, but he is buying heat and comfort in one instance in his home and he is buying power in the other instance where he is making steam. And whichever coal or fuel will give him that in the most satisfactory manner at the lowest price will be sold to him. And that is the job of myself and other distributors to find out what that is and see that he gets it. That is the way I stay in business.

[fol. 605] Cross-examination.

By Mr. O'Brian:

Our purchases of Appalachian territory coal have been declining in the last few years. I would say that in the last year I do not believe that we handled over 3,000 tons of Appalachian coal. We bought that from various shippers. In the last year we bought from the Blue Diamond Coal Company. We bought (834) from Carrs Fork Coal Company. We bought some from the Kerns Coal Company. And I think in the last year I bought some from Holmes-Darst Coal Company.

There has been very little Appalachian coal sold in Cleveland in proportion to other fields in the last three years because Hocking coal is taking the place of Appalachian coals in the city of Cleveland. It is probably true that Appalachian coals three years ago was only about 13% of all the coals sold in Cleveland. That was because a large quantity of the total consumption of coal in Cleveland is for large power plants which buy their fine coal where they can buy it at the lowest delivered price there, based upon what it will produce. Now our domestic coal in Cleveland is not comparable with the amount of domestic coal used in cities of comparable size on account of the tremendous amount of natural gas that is used there. That has been so for 25 years at least.

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(835) Scott Litton was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Clinchfield, Virginia. I am president of the Banner Fuel Company, the Dixie Splint Coal Company, and the Splash Dam Smokeless Coal Corporation. They [fol. 606] are all located in Virginia. That district is known as the Clinchfield district.

The Dixie Splint Coal Company and the Splash Dam Smokeless Coal Company market their coal through the Banner Fuel Company, which is a producing company and a selling company also. It maintains its own selling organization. (836) That selling organization does not sell for any companies other than ours.

The Dixie Splint Coal Company is located on the C. C. & O. Railroad, or the Clinchfield Railroad in Russell County, Virginia. The Splash Dam Smokeless Coal Corporation is situated on the same road in Dickenson County, Virginia. The Banner Fuel Company is situated on the Norfolk & Western Railroad in Wise County, Virginia.

The Dixie Splint Coal Company has produced approximately 100,000 tons per year since 1917. The Banner Fuel Company was acquired by myself in 1928. It has produced about 60,000 to 75,000 tons annually since that time. And the Splash Dam Smokeless Coal Corporation was acquired by me in 1928, and it has produced about the same tonnage.

The Dixie Splint Coal Company can produce from 800 to 1,000 tons of coal per day, or I should say, 150,000 tons annually. The Splash Dam Smokeless Company could produce possibly 100,000 tons. (837)

The Banner Fuel Company could produce from 80,000 to 100,000 tons. Depending, of course, upon the demand for the coal, and what outlet we had for it.

This could be done with practically no capital expenditures. There would be involved expenditures of cleaning up abandoned workings and pumping out places that were filled with water, and the replacement and the repairs of mine cars and machinery that has been lying idle for a period of [fol. 607] years. Particularly so with that of the Dixie Splint Coal Company.

The Dixie Splint Company produces nut, nut and slack, and egg, lump, and run of mine. The Banner Fuel Company

produces two by six egg, and two inch lump, four and five inch block and run of mine, and nut and slack. The Splash Dam Company produces only run of mine.

We sell these coals principally in the southern market. Virginia, North and South Carolina, some small portion in Georgia and Tennessee. With a very limited amount at this particular time moving into the western market.

(838) Coal produced by our companies meets very keen competition from practically all producing fields now. None of our companies have become affiliated with or subscribed to the stock of Appalachian Coals, Incorporated.

(839) Recently, in the last year, I should say, we have been feeling the competition from the outlying or adjoining districts, much more than we did formerly. We find now that in the market of North and South Carolina, the Kentucky coals have been cutting in considerably.

That has taken place more so, I believe, in the last 18 months than it did formerly. We also come in keen competition with the Smokeless fields of West Virginia, because one of these mines produces coal on the Norfolk and Western. It has a very elastic freight rate. That is, it distributes on both the Southern classification and the Eastern classification.

We do not enjoy a freight differential, but coal moves in competition in the eastern market, in the eastern part of North Carolina, and in Virginia, on the same rate as the Pocahontas fields ship on. It moves into the Southern markets on the same rates that coal moves from the Clinchfield district and the mines situated on the Louisville and Nashville and Southern—mines in the lower end of the district. We find that competition in the eastern part of the state [fol. 608] now is much more keen from the Smokeless fields because the Smokeless people seem to have just awakened to the fact that they could sell Smokeless coal in that territory.

That is particularly in North Carolina. The Kentucky coals are a strong competitor because of the quality and good preparation of Kentucky coals. While we have a freight differential, with present day prices ten or fifteen cents a ton does not mean much.

The natural market for our coal is North and South Carolina, Virginia, and parts of Tennessee. Coal from Alabama might possibly meet our coal in competition in Georgia. We

sell a very limited amount I believe in that state. In the event that Appalachian Coals, Inc., should increase its price and attempt to dominate the market in these Southern fields, our companies would increase their shipments of coal to that region. I should say that 75% or 80% of the coal produced in our mines now goes to these southern markets. They are our natural markets according to freight rate classification. (841) I should say that 75% of the production of our mines goes into the southern territory. 40% of the 75 moves into North Carolina, and 20 or 25% to Virginia, and the remainder about evenly divided between Tennessee and South Carolina, with possibly 5% moving to Georgia.

In the event of an increase of price in those markets it would be to our advantage to increase our percentage in those markets. We have practically moved the tonnage from these two mines—from this one mine particularly, and from the others, too, since we acquired it, into that territory. We go where we can get the best price.

Our companies were asked to come into Appalachian Coals, Incorporated. I declined for the reason that these companies are owned by myself, practically, and I have been marketing coal myself, part of the time calling on the trade [fol. 609] for the last 15 years, in the territory which I serve, and during that time I have built up a very good bunch of customers, and we maintain (842) a selling organization in Charlotte, North Carolina, and I did not feel that at this particular time it was to my interest to destroy the means for distributing the coal which we then had; and also we have not been any too prosperous, you know, and we did not have any ready money at this time to further invest in the coal business, to be perfectly frank about it.

In selling our coal in the Carolinas and Georgia we meet competition with other forms of heat and power. Gas and oil, for heating purposes particularly, and mainly electricity for power. Turning to electric power in the Carolinas has been very disastrous to the Virginia fields because the main portion of the power developed or used in the Carolinas, I should say, is electric energy.

I should say a great portion of it is hydro-electric. Some of the larger hydro-electric companies have stand-by steam plants which they run when the water is low, for periods, but that does not help us a lot, because they do not buy much coal in Virginia.

We operate a retail yard in Bristol, Virginia. We serve domestic customers and buildings, apartment houses, schools and hotels. Appalachian Coals, Incorporated, (843) could not injure my companies because I have my own coal.

I feel that Appalachian Coals, Incorporated, would be of real benefit to the coal industry. I believe that, being operated by men of experience and intelligence, and certainly with an honest purpose in mind, it would be able to do things for the coal business that the small operator has not done heretofore, such as carrying on an extensive advertising campaign and doing research work to try to [fol. 610] induce people who are using electricity to go back to coal—in other words, an educational program among the people to show that coal is the most efficient and most economical fuel to use. The small operator cannot do that. He does not have the capital to do it; and if this company is properly handled I think that they will be able to do that, which in itself will be not only a benefit to the members who join, but to the ones who do not become members.

I know a great number of these men who are identified with Appalachian Coals, Inc. I most assuredly think that they are of the character, training and experience to carry on that work in that association.

(844) By Mr. O'Brian:

If they raised the price of coal I certainly should expect to benefit by it.

By Mr. Donovan:

I would expect to do that by getting for the coal at least the cost of production which I am not getting today, and which I dare say no other Virginia operator is getting.

Cross-examination.

By Mr. O'Brian:

Q. That is, if they raised the price you would get a better price, or else you would get a larger volume of business?

A. I don't think they could raise the price except by doing away with a lot of practices which—

Q. Just a minute. Will you kindly answer my question directly?

A. Read the question.

(The Reporter read the pending question.)

A. Most assuredly, yes.

[fol. 611] (437) HAL E. BOOTH, a witness called on behalf of the defendants, testified:

Direct examination:

By Mr. Donovan:

I am sales vice-president of the Pittsburgh Coal Company, of Pittsburgh, Pennsylvania. I am in executive charge of the sale and distribution of the company's production. I have held that position four years. (438) Prior to that I was employed by the M. A. Hanna Company of Cleveland for 18 years, ending 1928, as manager of their bituminous coal sales.

The Pittsburgh Coal Company is a corporation under Pennsylvania laws having mines in western Pennsylvania, all located within a radius of 60 miles of the city of Pittsburgh. We have a subsidiary operating in eastern Kentucky, called the Pike Floyd Coal Company. Also we own a mine that is operated under contract by another concern in southern Ohio in the Pomeroy district, called the Syracuse Mining Company.

The annual production of these mines since 1920 has varied from a low of 4,000,000 tons in 1925, when our mines were on a strike, to a high of 14,000,000 tons. The production in 1929 was 12,000,000 tons. The present productive capacity of these same mines today is 18,000,000 tons.

(439) Classified by consumption, we produce coal suitable for steam, domestic and metallurgical purposes, coke making, gas making, and in fact the grades that we produce at our mines are generally suitable for practically all the uses for which coal in the northern section of our territory north of the Ohio River is used. By that I mean that they are equal in grade and quality to the coals produced in the southern Appalachian region. They are interchangeable

with such coals for these various uses. By interchangeable [fol. 612] I mean that a plant using coal of a given grade suitable for the plant's purposes from the Appalachian region can also use a similar grade from our region.

Our coal is sold in a very wide market extending from the so-called lake dock territory on the west, including the Dakotas, and extending on eastward to the Atlantic seaboard, but all north of the Ohio River. I am familiar with competitive conditions in those markets. (440) With respect to each of such markets, there is active competition between coal from the southern Appalachian region and coal from other producing regions.

In the so-called lake dock territory that is supplied by docks located at the west end of Lake Superior, both Appalachian regions and western Pennsylvania—our district—supply a considerable tonnage. I know of two by-product plants in that region that variously buy coal from our region or from Appalachian. At the present time both of these plants are using both of these two coals. I know of a big public utility operating chain of plants throughout the northwest in the lake dock territory, that has bought coal from us and has bought coal from the southern fields, and in fact at some of these plants today we are supplying [fol. 613] coal, and the southern Appalachian fields others of those plants. On the banks of Lake Michigan there are two by-product plants, both of which we solicited, and we were fortunate enough to sell one and some operator from the southern Appalachian field sold the other. A big steam plant on the west bank of Lake Michigan is using both grades indiscriminately in the production of power. In the thumb of Michigan one of the larger steam plants is buying coal from us; also is buying coal from the southern Appalachian territory.

Following eastward into our own territory, of course we (441) sell a great deal of coal local to Pittsburgh, and in the local Pittsburgh market where we have a decided advantage of freight, but nevertheless some Appalachian coal—in fact Appalachian coal in some quantity on the western edge of that territory is sold. (442) In Ontario, north of Lake [fol. 614] Erie, I have in mind two by-product plants, one of them using our coal exclusively, and the other using a combination of Southern Appalachian. Those plants switch

back and forth, depending upon where the best bargain can be had. A by-product plant still further East, and a gas plant not far away in Canada have used these two coals, from our district and from the Southern Appalachian district, interchangeably, dependent upon where they can get the best bargain. At the present time, both those plants are influenced by the injection of Nova Scotia coal into the picture, and they are even using that coal, which is not as suitable as either of our two coals.

On the Atlantic Seaboard we are in direct competition with Appalachian coals. I have in mind a big by-product plant that for years used nothing but coal from our district, and is now (443) using coal from the Southern district exclusively, while another plant not far away has been using Southern coal, and we are expectant and hopeful that within a short time they will be using our coal.

In the early days of the Pittsburgh Coal Company, which was formed in about 1901, the Pittsburgh Coal Company and other companies in Western Pennsylvania sold the bulk of the coal in Michigan, northwestern Ohio, and northern and eastern Indiana, but by reason of a number of difficulties, including labor troubles and strikes, transportation deficiencies, and the zoning of coal by the United States Fuel Administration during the war, we were forced out of that market, and are just now seeking to regain some of it. We are soliciting business in that field, with active salesmen there.

The territory to which I have just now referred is, in the main, the yellow territory marked "2" on Defendants' Exhibit 9. (444) That takes in northwestern Ohio, Michi- [fol. 615] gan, and northern Indiana, and likewise a little farther into Illinois in and about Chicago.

In delivering coal to these various destinations the freight rate is a very large percentage of the delivered price in most localities, except those adjacent to the mines, and even at those points the freight rate is upwards of 40 or 50%, and to farther destinations, upwards of 75% of the delivered price.

I know more or less about the levels of freight rates on shipments of coal to the various destinations to which I have referred. I know that in our district in western Pennsylvania we are not entirely happy with them, but

nevertheless we are able to ship to this territory that I have defined, where our coal moves and sells, and we are soliciting business there and are selling coal there. (445) I feel that under existing tariffs we are able to compete in that territory.

In the shipment of Lake coal we have an advantage of 35¢ over this high volatile Appalachian region. On all rail shipments to Michigan, Indiana, and western Ohio, from all points west of a line drawn north and south through Sandusky, we are on a parity with this Appalachian territory. We obviously have an advantage over them in our home territory, the territory adjacent to our mines. We have some advantages in the central New England States, until we meet the movement of tidewater coal coming inland from tidewater. We have an advantage in certain eastern Canadian places.

Q. Assuming that producers located in the southern Appalachian region representing 75% of the present production of that region have subscribed for stock in Appalachian Coals, Inc., and have agreed to dispose of their coal exclusively through this selling agency, at prices determined by it, can you answer these three questions? Assuming these facts, has Appalachian Coals, Inc., in [fol. 616] your opinion, the power to put your company out of business? Second, has it the power to put its competitors generally, or any of its principal competitors, out of business? Third, has it, in your opinion, the power to wage a destructive warfare against any of its principal competitors, without involving any or all of them in that region?

A. My answer to the question whether Appalachian Coals, Inc., would have the power to put us out of business, is no.

(446) (Counsel for the United States objected to an answer to the second question on the ground that the witness could not testify of his own knowledge to the condition of all the other competitors in the United States, or what particular factors affect them. The court overruled this objection and allowed the Government an exception.)

(447) Answering the next question, I do not think Appalachian Coals, Inc., would have the power to put out of

business its competitors generally, or any of its principal competitors. The reason is largely based on the experience I have had in the coal business, and the observation of how such things work. Should Appalachian Coals, Inc., try to put one of its main competitors out of business, which means, to my mind, simply taking business away from that concern to the extent that that concern would suffer, that concern, so long as it is located as we are located and as the other operators in that district are located, would have the opportunity, and would, in protection of its own production, retaliate by attacking, on the same basis—presumably of low price—the business of Appalachian Coals, Inc.; and once those two, the original act and the retaliation, had taken place, the general conception of the level of coal prices would immediately be reflected in those prices made, and the whole level of prices would tumble to that basis, even though that process were not continued to any great length. But it would be a process of attempting to capture the other operator's business, and a retaliation, and back and forth, until nothing had been accomplished. (448)

(Counsel for the United States objected on the same [fol. 617] grounds to the witness' answering the third question. The court overruled the objection and allowed an exception.)

Answering the third question as to the power of Appalachian Coals, Inc., to wage destructive warfare against any of its competitors, I think for very much the same reasons that, if destructive warfare were attempted in one direction, retaliation would occur in another direction, and the individual starting the fight or conducting the fight would be injured to the same degree as the second one.

In 1923 the production in western Pennsylvania was about 3,500,000 tons a week and, that being a big year, it can reasonably be interpreted as meaning somewhere short of actual capacity.

If the stated purposes of Appalachian Coals, Inc., can be accomplished, and we may only take one purpose, if Appalachian Coals, Inc., can eliminate, among its members, (449) this distressful and destructive quotation of prices to a degree, that would be helpful to our district.

Just the elimination of a few destructive prices that are extant at this time, would be helpful to us.

What I mean by the elimination of distress prices is this: A coal man in distress, I mean with his coal, quotes a very low price by reason of his very distress, and he quotes that price to a great many different people. The longer he is without a sale, the longer he continues tc quote that price. So it comes about that a very small tonnage of coal is quoted to so many people that it becomes multiplied beyond all reason, and quite naturally the buyers, having those quotations come to *him* frequently, feel that there is really a large volume of coal to be obtained at that price, when as a matter of fact, there is not. There is a relatively small amount, but still making the price for a bigger amount.

We have gone to considerable lengths in developing the preparation methods for coal, and have spent a great deal of money in adopting our process of cleaning, which is a washing process, and we have built four very large plants, (450) capable of a very large production of coal, upwards [fol. 618] of 8,000,000 tons a year. That removes all extraneous foreign matter, all removable foreign matter, such as slate, rock and foreign matter that fall into the coal in the natural process of mining and extracting it from the ground. Practically all removable free impurities are ash, and the removal of those free impurities obviously makes the coal more useful for any purpose for which it is sought.

I think perhaps we were more or less the pioneers of this cleaning process, and therefore more successful, except for the low volatile fields, which have practiced it for a long time. But it is coming more and more into vogue where necessary. But perhaps it finds its highest development in high volatile coals, in our field, and perhaps in our company.

Cross-examination.

By Mr. O'Brien:

(451) I have not the figures as to the amount of coal we have sold since 1929 in Michigan, Ohio, Indiana and Illinois. I suppose that in 1929 we sold in that territory in the neighborhood of 300,000 tons in those four States.

Q. In answering a question calling for your opinion as to the ability to put a competitor out of business, of course there are many factors to be considered with reference to a particular competitor, aren't there? His strength, or weakness, his financial condition, his merchandising capabilities, the extent to which he can sell, his accessibility to markets, and his ability to get credit, even, aren't all those factors in a fight of that sort?

A. I suppose they must be taken into consideration. But we as sales people just don't think about that. That is to say, what we think about is the price and competition and quality and service, and then who gets the order.

Q. Is there any such thing as a mine's normal or ordinary capacity?

A. Not that I know of. That is a matter of the individ-[fol. 619] ual operator's opinion, of the size of the mine he can make the best showing out of.

Q. Have you an opinion as to that? What size mine, the smallest size mine, do you think capable of economical (452) management and to have a good sales force?

A. In our own experience, that is altogether a matter of conditions. There is no universal rule that can be applied.

Q. It is always so, isn't it? It is all a matter of the conditions in such particular case?

A. Yes.

Q. It is not only a question, then, of the amount of coal in a mine to be extracted, but it is a question of the cost of mining, the cost of labor, whether the owner of that mine has an adequate sales staff, whether his sources of information are adequate for getting his coal to market; all these items, and many others, enter into each individual case?

A. As to ability to survive?

Q. Yes.

A. I think obviously so.

(453) We have recently sold coal in the area marked "2" on Defendants' Exhibit 9, and since 1927 we have done so and are doing so.

Our productive capacity of 18,000,000 tons is our own figure, what our mines, as producing today, would do if they could run every day.

By Judge Parker:

Q. What effect, if any, in your opinion, would the organization of Appalachian Coals, Inc., have on the price of coal in that area, or, to put the question in another way, would the (454) fact that these associated companies control 73% of the output and more than 50% of the capacity of the mines in that territory enable them to raise or lower prices?

A. I do not think that would give them any hold on the [fol. 620] price. Perhaps an illustration would be best. I will take it from our own history. The Pittsburgh Coal Company started in 1901 with 90% control of the Pittsburgh district in an effort to secure and obtain good prices. The inducement was present for other people to come into the coal business and to under-sell those prices and get better operating time while the Pittsburgh Coal Company was attempting what now appears to have been the impossible. Today the Pittsburgh Coal Company perhaps has less than 8% of control or of production in the district. And in that period other operators both new and old took that business. The effort of the Pittsburgh Coal Company to obtain those prices, in effect resulted in what has latterly come to be known as "holding the umbrella". By that I mean that we have tried to maintain the high prices and our competitors have come in and got the business at a lower price.

(454) When we had originally 90% of the production in our field, the coal produced by the Pittsburgh Coal Company ranged from 20,000,000 to 25,000,000 tons annually.

The reason why we cannot undersell Appalachian coals in the lake cargo territory is a matter of cost of production and the return on our investment and amortization of plant and depletion of property. We have a 35c differential in our favor over Appalachian territory, but we are (456) located in a very densely populated country that is highly industrialized, in the midst of steel mills, and intense civic ideas of advancement, schools and what not, and our taxes are very, very high. It is near the markets, and being nearer the industrial market impresses that additional value on the coal land and affects the taxes in that way. Very largely our differences are accounted for by those two factors, taxes and the value of the coal land, which is the

depletion or amortization item in cost. The fact that our property is carried on our books at a high figure does not necessarily prevent us from meeting the competition of Appalachian territory, but it provides one of those desires [fol. 621] that we have to make our statements look profitable. I do not mean to convey the idea that the way we meet that is by going out of the market altogether, because we are actively competing, and on the Lakes our company alone sold 3,000,000 tons in 1929, and we met the competition. (457) But there was not any occasion for our more than meeting it.

I cannot give any comparative figures comparing the cost of producing a ton of coal in our district and a ton of coal in Appalachian territory. That is outside of my sphere of action and I have not got those costs.

By Judge Soper:

Q. If you do not know that figure then how can you express an opinion that it is difficult for you to undersell or to meet their prices?

A. Well, we face the necessity of selling our coal and meeting the competition as we find it, and that is just what we are doing.

Q. Well, all that you mean is that you are not going to sell any lower than you have to?

A. No.

Q. So that, if I understand you, you express the opinion as an experienced man that the organization of these sales agencies will have no effect whatever on price? (458)

A. Except insofar as the elimination of these distress prices and destructively low prices is concerned—the elimination of them and the improvement of trade practices. There will be a greater revenue accruing to the coal operators—

Q. I am talking about price alone, now; not about economies, but about price. Do I understand you to say that in your opinion there will be no influence upon price except insofar as there will be an elimination of certain distress coal?

[fol. 622] A. I do not think that the adoption of these plans, so far as they will be and can be adopted, will affect the general market level of prices for soft coal in this region with which I am acquainted.

Q. Will it have any effect locally, generally, or in any other way?

A. Beyond the economies——

Q. Economies are not going to raise the price, or lower it, necessarily?

A. I do not think that it is going to affect the level of market prices. That is the answer.

Q. Do you agree that there is a potential capacity in and near this Appalachian territory which is outside of the Appalachian Coals, Inc., but is equal to the capacity of Appalachian Coals, Inc.? What is to become of the distress coal from the 50% capacity that is not in Appalachian Coals, Inc.?

A. That will undoubtedly proceed as it is proceeding now.

Q. Even that factor will not be taken care of, if I understand you?

A. Only partially. (459)

By Judge Parker:

Q. If those controlling 73% of the coal in a certain area agree among themselves that they will advance the price of coal 25c a ton, do you think that would not affect the price of coal in that territory?

A. It depends, of course, upon the marketing area, and how much of a widespread market there is. If they attempted to do that in the city of Detroit, speaking of Appalachian Coals, Inc., they could not do it, because we would step in and take that business. We would want it.

I am not familiar, from the standpoint of marketing, with southern West Virginia, western Virginia, the Carolinas, [fol. 623] eastern Kentucky or Tennessee, or anything south of the Ohio River. When I answered a previous question whether I thought that Appalachian Coals, Inc., would have no effect on market price, I was intending to confine my answer to the territory with which I am familiar in marketing coal. I was speaking entirely from that standpoint.

(460) Q. You are saying in substance, are you not, that you do not think that in the northern territory they will be able to raise the price, because of competition, because you will step right in and take their business. Here is a

section of the country, in South Carolina, where they are furnishing 96% of the coal, and the competition of Smokeless is only 4%. Alabama is negligible. It has only 1700 tons. Certainly, if they cared to raise the price in that territory, it would seem that it would have an effect on the market, would it not?

A. I don't know whether they could. I don't know how much reserve supply there is in Alabama or Smokeless that would tend to prevent them from increasing the price. They could not just go out and increase it, unless there was no other coal desiring to replace it.

(461) Q. Take the western part of North Carolina, for example. If there were a freight differential in favor of the Virginia part of this Appalachian field—I will just take an arbitrary illustration of 17c a ton—this group could probably raise the price there to some extent before competition would pound it down, could it not?

A. I suspect they are now making use of that 17c. They would be very foolish if they were not using that 17c; so that when they would arbitrarily put the price up again, it would again resolve itself into a question of whether there was any available tonnage desiring to supplant them.

They can affect the market, obviously, unless there is an adequate supply of competitive coal that can come in and take the business away from them.

[fol. 624] Redirect examination.

By Mr. Donovan:

If the production in this Appalachian section is furnished, 58% by the defendant producers and 48% by non-defendants, including captive mines, that would be quite an important factor in considering the competitive element, in holding down the price. If the total capacity of non-defendants in that region was 82,000,000 odd (462) tons, including captive mines and 12,000,000 tons production in the surrounding territory, and that of the defendants was 86,000,000 tons, that would be a very important factor.

The limitation placed upon any effort to fix price is the willingness and ability of competitors to come in and cut that price. That ability would depend upon the capacity of those mines, and their desire, to send coal into that territory.

It appears from Defendants' Exhibit 9 that South Carolina in 1929 used 2,400,000 tons of bituminous coal. There is evidence (463) that the total capacity of mines of non-defendants in the territory from which Appalachian Coals, Inc., will ship coal, is 82,660,000 tons. That has a large bearing upon what price could be determined in that State. (464)

Our company last year lost about $2,000,000. As to whether we lost money on the lake cargo coal, our figures are not segregated.

[fol. 625] (595) CHARLES F. B. WARD was called as a witness on behalf of the Defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I am a wholesaler of coal; president of the Wieman & Ward Company, Pittsburgh, Pennsylvania. My business is [fol. 626] the wholesale coal business. I sell bituminous coal. I am also personally a producer of coal. The selling is done through the Wieman & Ward Company (596) located at Pittsburgh, Pennsylvania. This company purchases coal from various mines and resells it to consumers and retail dealers, purchasing it at the best prices possible and selling it at the best prices possible.

I am president of the American Wholesale Dealers' Association. That is an association of wholesale dealers in the United States and Canada, that was brought together during the War for the purpose of the dissemination of information to all dealers.

In 1920 my company sold approximately one million tons of bituminous coal. It purchased coal from various operating companies throughout Pennsylvania, Ohio, and West Virginia. I have not purchased coal from any of the defendant companies. I purchase some Connellsville coal from (597) the Puritan Coke Company, the Vulcan Gas Coal Company, the Bittner Coal & Coke Company and a good many others through the district. In the Pittsburgh field I would say the Chartiers-Kirk Gas Coal Company; the Penobscot Coal & Coke Company, and quite a large

number through there at various times. We purchase from mines in the Fairmont district and the Central Pennsylvania low volatile district. In Ohio we purchase mostly in the No. 8 and No. 6 districts. No. 8 district is in the Eastern part and the No. 6 is in the Cambridge field. These fields are competitive with Southern Appalachian coals in a good many districts. They compete in kind and quality with coals from the Appalachian fields.

[fol. 627] Coal from the Fairmont, Morgantown, and Ohio districts compete with the high volatile steam coals in the southern Appalachian fields. The Westmoreland field is considered a gas coal and would compete with the low sulphur, low ash, gas making coals from the Appalachian district. The Connellsville coals compete with coal suitable for by-product work.

In my opinion, there has been quite a great deal of active competition in the sale of bituminous coal in the markets in which my company has purchased coal. There has been a great quantity of coal produced, and every operator in the district and every wholesaler, of course, is trying to find business for the greatest amount of tonnage possible. Our markets are in the New England States, the Central States and around Buffalo, Cleveland and Youngstown, mostly—the Pittsburgh district, of course. Quite a great deal of natural gas and oil is available in the regions in which we operate. Anthracite, (599) of course, is a substitute fuel for bituminous coal in many cases, and coke made from bituminous coal. Assuming that producers located in this Appalachian Territory, and representing 75 per cent of the present production of that region, have subscribed for stock in Appalachian Coals, Incorporated, the selling agency, and have agreed to dispose of their coal through this agency, and at prices determined by it, in my opinion I would be able to buy coal in an open competitive market. There would be a very large amount. As I understand it, if Appalachian controls 75 per cent of the coal produced in that district, it would be less than 10 per cent of the coal that would be available in the markets where we sell. There would still be some Appalachian coal, or coals of the same district, that would be available. I think that I would be able to buy enough coal for my needs.

[fol. 628] (600) I believe that the probable effect of the organization of Appalachian Coals, Incorporated, upon

wholesalers of bituminous coal would be a big help to wholesalers in that there would not be so much pyramiding of tonnages. Pyramiding of tonnages comes about in many ways. The small operator offering coal to many wholesalers will pyramid that small operator's tonnage.

I might cite a case of my own, when I was a little younger in the business. During the time when there was quite a market at Tidewater for export coal, I got together about 20,000 tons of coal, then classified as Pool 34, coal, which was steam, just ordinary steam high volatile coal, starting at New York tide, to be sold upon arrival. About two days after it was started from the mines, I called one or two exporters in New York, and told them of this coal, offered them this tonnage of coal subject to a prior sale. They did not take it at once, but they were seeking a market for it.

The next day, I had not heard from them, but I had heard indirectly that there was quite a large tonnage of Pool 34 coal being offered in New York City. So I checked with the railroads to see if there was a great deal moving there, and they said not. So I immediately thought there must be a pyramiding of my tonnage. I withdrew my offers to the three people to whom I had made them informally, and the next day I had quite an active demand for this coal and sold it very readily. Now, these (601) 20,000 tons of coal that I had started down there, had been pyramided by being offered from one to another in New York City, until every one down there thought there was possibly 100,000 tons of coal in the market, when as a matter of fact there was very little.

[fol. 629] In other words, that 20,000 tons being urged on the market, the same coal being urged on the market for a number of selling agencies or agents, had the effect of creating the impression that there was more coal than there actually was in that market and that the market was overloaded.

By Judge Soper:

Pyramiding usually beats down the price. When there is a large quantity of coal offered, they do not seem to want to buy.

By Mr. Donovan:

In other words, when they are led to believe that there is more coal than there actually is on the market, and

believing there is more coal than there actually is, offers are made lower than the market price. And it may at the end be very disastrous to the buyer, if he believes there are 100,000 tons on the market, when there are only 20,000 tons, and somebody buys the 20,000 tons, he may have to pay a very high price for what coal he wants. (602) There certainly would be a more accurate determination of market conditions by the existence of such an agency as Appalachian Coals, Incorporated.

Cross-examination.

By Mr. O'Brian:

As it is now, we are competing against 137 of these defendants, but after the organization of this agency we would be competing with just one fellow. I have not been buying Appalachian coal for two or three years. No, I cannot tell definitely what the effect of the organization of this agency would be on my particular business, but at the present time, it would have none, other than this, after the Pittsburgh Coal Company was formed—and I know not from my own experience, but my people were in business before me—that there was quite an active market for [fol. 630] coals outside of the Pittsburgh Coal Company (603) in that district. I said that I estimated that Appalachian Coals, Incorporated would have less than 10 per cent of the competitive fields of the Eastern District of the United States. I mean East of the Mississippi River. Appalachian Coals, Incorporated, is not equally competitive at all points in that area with every other coal, but in the large markets it is. It is not at all, or very little, competitive in the Buffalo or Pittsburgh markets. Practically none. I stated that natural gas fuel was a competitor in Pittsburgh, Cleveland, Youngstown, Buffalo, and other areas where I sold coal. (604) There is a good deal of natural gas now in Buffalo. No, I do not know what the rate for natural gas in Buffalo is. In Youngstown and in Cleveland it is used very substantially. I cannot with any degree of accuracy give any basis for my answer as to what the tonnage of coal in Cleveland is that is displaced by natural gas, but it is, of course, a competitive fuel there. The most of our coal is sold in Pittsburgh and the Eastern area, Youngstown, Cleveland and as far west as Detroit.

In 1929-30 or in 1930-31 we sold in Detroit about 150,000 tons. No, we did not sell the most of our coal in the immediate district in and around Pittsburgh and in that section of Ohio. (605) Our coals are mostly sold in Buffalo, Cleveland, Youngstown and in the East. In the New England States, and New Jersey and New York State. I do not know that I could say that the price of coal would be stabilized by the organization of Appalachian Coals, Incorporated, because they seem to be handling so many different kinds and grades of coal. I understand what the word "stabilized" means. The formation of Appalachian Coals, Incorporated, would have a good effect on the wholesaler by eliminating the competition of the small mines to the wholesaler. I could cite you a case, if I might. [fol. 631] I went to Cleveland not long ago offering a very high grade by-product coking coal, and my price, incidentally, was $1.20 a ton. I remember that very distinctly. The buyer (606) pulled a letter from his drawer, and showed me an offer made to him at 80 cents a ton, and he said to me, "This is the same character of coal you are offering me at $1.20 a ton." He turned the top of the letter down but I saw the name at the bottom of the page. This was a very, very small mine, that could not have possibly served this company, and yet that 80-cent price was being used by the buyer to beat my price down. And that is the case all over, that the small operators operating and going out by themselves when they get very hungry for business, and they will go out and make almost any price at all. I think that the organization of the selling agency in that area would eliminate that element.

(607) By Mr. Donovan:

By eliminating that element I mean that it would stop the buyer from using a mine like that—really a mine that could not serve him, a mine that the buyer knew could not serve him because he tried to hide the name of the company that was offering it to him, knowing that I knew the mine. No, I do not mean that it would eliminate the small mine from the field in which it could legitimately operate. The small mine would be within the sales organization. The small mine can produce coal much more cheaply than the large mine.

By Judge Soper:

[fol. 632] (608) By Mr. O'Brian:

I would say in 90 out of a hundred cases a small mine could produce cheaper than a large one. I do not know of any small mine that cannot produce cheaper than a large mine. I am myself a coal producer. I do not know that in the last ten years there has been a trend toward the steady development of larger mines and the gradual elimination of the small mines. I am speaking of my own field now. Economically I would say that the small mine can always produce cheaper. I cannot explain why there has been a trend to larger mines. I do not know that there is. I was not aware of that, if that is the fact.

By Judge Parker:

Q. In your opinion would the elimination of the competition between the producers who join in the sales agency have any tendency to enable the sales agency to control th price of coal?

(609) A. Within their own agency or generally?

Q. Well, within their sales territory? The territory that they can reach by their product?

A. Not in a normal market at all.

Q. What do you mean by your answer?

A. Well, if it were a seller's market of course they can name a price, but in a buyer's market of this kind they would have to abide by the competition. Of course in a seller's market they always can name their own price. Any mine can.

[fol. 633] By Mr. Donovan:

Any seller can. But I do not see how they can possibly control the price of coal.

Q. Not even in the restricted territory that you have heard described here of North Carolina, Virginia and West Virginia and South Carolina and west Tennessee, west Kentucky and northern Georgia? Do you think they would not be able to control prices within that territory?

A. I don't believe they would, for the simple reason that other coals would immediately seek that market. If the

price would advance in that territory other coals would immediately seek that market.

By Judge Soper:

Q. Do you testify that the organization would have no influence on prices?

A. I believe they would not have a direct influence on prices.

(610) Q. Well, would they have an indirect influence? And if they would have an indirect influence, what do you mean by that?

A. I would say that they would not have an influence on prices. They would not control sufficient coals to have an influence on prices.

By Judge Parker:

This agency could not have any effect, in my opinion, on the market price of coal up in the Ohio and Michigan territory, or in the lake cargo market or on prices at tidewater?

[fol. 634] By Mr. O'Brian:

My coal company is located in Uniontown, Pennsylvania.

Q. It appeared in the evidence here this morning that the Miami Valle, which is north of Cincinnati—about 90 per cent. of all the coal used there came from this Appalachian territory. Now if it were true that 99 of these defendants—if it were true—were today competing in price in that area (611) for that business, don't you think the organization of the sales agency that would eliminate all that price competition between them would have some effect on the market there?

A. It would let me into the market.

Q. Yes. Why would it let you into the market?

A. Well, I say if it had any effect on it in the way of raising the price I would immediately go into it.

Q. Well, now, wait a minute. You would expect that it would have some effect on raising prices, wouldn't you?

A. I wouldn't know, because Cincinnati has——

Q. No, no, now let us be fair about it. Do you think that with 136 of these people all together and 99 of them com-

peting in an area—I am assuming that figure— [fol. 635] now just assume that to be true—and the prices there today in that area where they have 91 per cent of the business is being fixed by competition between that 99 members who have the 91 per cent of the business and the others, would you think that an organization which entirely eliminated price competition between those 99 sellers and substituted a sales agency for them would have no effect whatever on the market price of coal in that area?

A. Well, that is a very highly competitive area in there. There are plenty of coals available to the district. I don't see why——

Q. (Interposing.) But there is none coming in there now except Smokeless coal and Appalachian at present?

A. Well, I don't know that situation.

Q. Well, that is the fact. Now, wouldn't you perhaps answer the question more clearly by saying that (612) it would probably have some effect by your coming in and others coming in?

A. I think that is true. If they would attempt to raise their own prices in that territory it would immediately be offset by other coals coming in.

Q. Now you keep saying "if." You would expect that that would have the effect of raising the price somewhat, wouldn't you—to eliminate price competition between 99 competitors in that field?

A. I would not, no.

By Mr. Donovan:

Assuming that this group of 99 raised the price of coal [fol. 636] ten cents, the price would not remain up ten cents. It would go down. When I say it would have no effect I mean the competitive condition there would be as it is and that the other coal going in, whether the other producers (613) went in would depend upon their ability to produce and to get the coal in there.

By Mr. O'Brian:

My ability to get in there would depend upon the freight rate and the cost of the coal to me. I do not know the freight rates in there from the Pittsburgh and West Penn-

sylvania districts. The consumer of coal, of course, is always interested in the delivery price, and that only. And not knowing the freight rates in there I cannot argue from that point.

[fol. 637] Vol. 4

(849) Robert L. Boykin was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Spartanburg, South Carolina. My business is the purchasing of coal. For a period of about nine years I have been employed in purchasing coal for about 117 manufacturing plants, mostly in the textile and allied interests. Prior to that time I was engaged in the sale of coal. (850) I have been in most of the mines in the Appalachian territory. The mills for which I purchase are located, roughly speaking, from a boundary of the Virginia line on the eastern section of North Carolina to south of Atlanta, Georgia, and from eastern Tennessee to Augusta, Georgia.

Under normal conditions, I purchase for these 117 manufacturing plants about 600,000 tons of coal per year. Under present conditions these purchases would run to about 350,000 tons per year. I would say that I purchase coal from about 90% of the defendant companies located in Harlan, Virginia, Tennessee—that is Southwest Virginia and Tennessee. Among the non-defendant companies from whom I have purchased are the Mary-Helen Mine, the Brookside properties, the Coxton and K. U., and properties in Kentucky; the Banner Fuel Company in Virginia; the Dixie Splash Dam properties, and the (851) Dixie Splint properties. There are some more of them, but I just can't remember their names.

[fol. 638] The coal so purchased is used generally in northern South Carolina and upper Georgia, as well as eastern Tennessee, where these textile mills are located. It is possible to interchange the uses of these coals for the mills for which I buy. The coals from the various districts are interchangeable for the use of these mills. In order

that these various coals be used, your load factor is, of course, a primary object. The cost of 1000 pounds of steam is paramount. We use coal inter-changeably by the method of changing the speed of our stokers, that is, the volume of coal, or less volume of coal, as necessary, and by the changing of our drafts. It causes more expense.

(853) With reference to the practice of buyers in obtaining this coal as a matter of fact, we do by every fair method possible play one company against the other. We usually try to tell the coal companies the truth, but if that company—if one of these men is weak enough to fall, and they are willing to give us domestic coal, for instance, at the same price as their mine-run product, we are perfectly willing to accept it. The practice exists among purchasers of stating to one producer that another producer is willing to sell at a price at which he is not willing to sell, but which the buyer in reality names. (854)

In this regard, if Appalachian Coals, Inc., comes into actual existence, I do not think it would be a panacea, but I do believe that it would be helpful.

Assuming that Appalachian Coals, Inc., did come into actual operation and controlled 73% of the production in the Appalachian territory, and that all the producers who joined it subscribed to the stock of the Appalachian company and employed under contract that company as an exclusive agency and gave that agency the power to deter- [fol. 639] mine the price, I do not see how it would be possible for that company to fix the price for coal and hold it in the territory where I work. (855)

My reasons are these: Demand, in the first place, is one of the largest factors in maintaining any price on any coal. If you have not got the demand, you cannot fix the price. In South Carolina, we have a good many coals which are not incorporated in this proposed company, whose freight rates are similar. I know of certain properties in Virginia which, in 90 days, could be expanded from 10 cars a day to 50. There are other properties that could be expanded just as rapidly, which would give us all of the coal which would be necessary to combat any arbitrary price-fixing which might come up. Not only that, but there is a great deal of undeveloped coal at favorable tipple height, without any great expenditure of money, that could be put in operation.

(856) By undeveloped coal I mean seams of coal that are worked at some points, but not at those particular points. In other words there is a good deal of acreage of coal that has not yet been placed in operation, available for anyone who cares to purchase a lease.

I am familiar with the use of substitute fuels in the southern territory. Some years ago, when I was living in Havana, Cuba, in introducing American coals in other countries, I heard that there had been a development of the coal business in what is known as the Pebble Phosphate district in Florida. That is about 60 miles south of Tampa, with probably Bartow or Mulberry, Florida, about the center. Underlying that whole country is an enormous deposit of pebble phosphate which goes into the manufacture of fertilizer.

I went into that territory, and in a year and a half to two years developed a tonnage of about, or approximately around 300,000 tons of coal annually. In addition, I secured [fol. 640] some tonnage from the Florida East Coast Railroad. The coal was unloaded at Mayport, below Jacksonville.

We enjoyed that business for about two years and a half, and it amounted to about 400,000 tons or 500,000 tons including railroad fuel.

In a year and a half a Texas oil came in, and then oil came in from Tampico, and that coal business dropped down to 40,000 tons. They were selling fuel oil at 85 cents a barrel (857) delivered at the various points. They simply knocked that business out, and there is none of it left today.

In the Carolinas and Georgia I personally do not come in contact with fuel oil. You will find, however, at the coast ports, like Savannah and Charleston, that fuel oil is in daily use. In this territory power companies at the present time have more power than they can possibly sell, and under normal conditions I would say that they are two years ahead of their requirements.

The mills for which I purchase coal can make use of smokeless coal. We purchase quite a tonnage of smokeless coal. We are today changing plants, in fact have made the (858) changes both in hand-fire and stoker plants, for instance at Graniteville, South Carolina. We have changed from high volatile to smokeless, or from smokeless to high

volatile, and the cost per ton for steam developed is less than on smokeless. That is why we are using high volatile coal. It is cheaper.

Cross-examination.

By Mr. O'Brian:

Q. Nearly all your mills, however, are equipped primarily for high volatile coal?

A. Well, the hand-fire plants that were built 20 years [fol. 641] ago, as to them, I don't think they knew very much about what they were designed for.

Q. But high volatile coal has been used in those plants almost exclusively, hasn't it?

A. I would say 75 per cent was high volatile, yes sir. That is, roughly speaking. Now we have plants, this Graniteville plant I spoke of was one of what was known as the old finishing group. They used smokeless down there for 25 years, long before I ever came into that country.

I recall being interviewed by Mr. Snyder, representing the Department of Justice, three or four weeks ago. In substance, I said to him that high volatile coal requires boilers with high fireboxes, which (859) give plenty of space for the volatile gases to combust under the boiler, rather than in the chimney; fireboxes and boilers in North Carolina and South Carolina cotton mills have been constructed to give the amount of space required for combustion, and high volatile coal is needed; low volatile coal cannot be burned under such boilers because the combustion is complete before it reaches the bottom of the boiler and the boiler is heated with smoke only. That is true as to some of the old plants that were installed 15 or 20 years ago. That is not true of the modern plants. In North and South Carolina about 75% of the old plants for the cotton mills had been constructed for high volatile coal. There is on foot right now, and I dare say that if business improves in that section, 50% of the old plants which are now being used and which have become obsolete, will be torn out.

(860) The firing equipment will be changed in the future. These boilers are inspected annually by the boiler inspectors. They have now so cut down the steam pressure which

they permit, that they will either have to shut down many of those plants, or they are going to have to put in new equipment. They are going to be forced to do it.

[fol. 642] I stated to Mr. Snyder, speaking of North Carolina, that there are no fuels other than coal which can be substituted for high volatile coals. Fuel oil, natural gas, and so forth are prohibitive in cost, or not available. I am speaking of fuel oil in the interior, except for use in the Diesel plants.

That is also true of South Carolina and Georgia, except on the coast.

(862) We have no natural gas in the state of South Carolina and no fuel oil so far as I know in the interior. There is some on the coast that may be used for Diesel engines, but that does not enter into my business at all.

With respect to hydro-electric power as a substitute for fuel in the cotton mills:—all cotton mills in their method of operating have to use coal for heating in the winter and for slashing during their daily operation. All of the finishing plants and (863) dye plants must use steam primarily. While electricity is a secondary consideration with them. Slashing is the heating up of the starch and soap filler which goes into the finishing of the cloth. All cloth is run through what we call a slasher. During the War coal was expensive, the power companies advertised their product quite extensively and they could change a cotton mill very quickly from a steam driven plant to an electrical driven plant by installing motors. We cannot use electricity in this slashing process, we have to use steam.

I would say 75% of our mills are now electrified and buying power for what we call primary power. Now they have what we call a secondary power contract which they are privileged to take if the power company has sufficient power to give them. At the present time the power companies have all of the power available for secondary contracts that the mills will take. Those are the two forms of the power [fol. 643] contracts: the primary and secondary contracts. Today I do not know of a single new plant or old plant that is being changed that is not going to steam. They are coming back to steam. (864) Coal is therefore of vital necessity in the cotton mill business, as it is everywhere else.

I don't think that I should assume, in answering your question as to the effect on the markets of North Carolina, that instead of 70%, that all of the Appalachian territory operators came into this plan, so that the price for all of the operators for the eight districts was fixed by a selling agency.

Q. All right then, you need not. Stop right there. Now then 73% of these operators have combined, and their coal is to be sold in your territory under this plan at a price fixed by a single agency so that instead of 77 operators, for example,—assuming that number—competing with each other for business the price will be fixed by one agency, do you think that will have no effect whatever on the market? Or may it have an effect?

A. I don't believe that any group of operators can fix a price on their coal. I will even go so far as to say that I do not believe that if every operator in the Appalachian system would go into this organization that they can arbitrarily fix the price of coal.

(865) There are apparent reasons why they cannot do it. You have got a natural competitive situation. The limit of differentials in freight rates coming into our freight section, from the Appalachian territory is 23 cents against the Appalachian territory. I am speaking of South Carolina.

(867) Take Spartanburg as a center. The lowest rate we have is $2.53, from Virginia and Coal Creek. The next rate is what is known as the Westborn rate, which is 5 or 6 cents a ton higher.

[fol. 644] The Virginia rate covers high volatile, semi-smokeless coal from Appalachian territory. The smokeless (868) rate into Spartanburg is $3.15, the Harlan rate is $2.76.

The rate into Spartanburg is 62 or 63 cents in favor of the high volatile coals as against the smokeless coal, but as you get farther away from the mines, those differentials gradually work together.

(869) I don't remember the rates from the Alabama fields into South Carolina. There are some Alabama coals that go into South Carolina. The exhibit you show me shows 1,700 tons in 1929. We consider Appalachian coal better coal than Alabama coal. The Appalachian coal is recog-

nized as really the best in the country, with the exception of smokeless. There never has been a situation up to date where 73% of the coal was being grouped and handled in a single agency.

(870) If the smokeless field were similarly organized and controlled to the same extent as the Appalachian field, I do not see how it is going to be detrimental to the consumer at all. I do not see how it would be possible, if they had all eleven districts organized, for those people to arbitrarily fix a price on their coal.

(871) The picture is that it is not a mine-run product the coal companies are selling. They have in the smokeless field five different kinds of coal. It is a very difficult thing to balance that. In other words, they will get a market on one size, and the other size will be a perfect drug. They have to give it away. It is not humanly possible, except under absolutely abnormal conditions such as the War, for any company to arbitrarily set a price on its coal, because it cannot set a price on five different sizes.

[fol. 645] Because it is very exceptional, where you find that all five sizes are in demand. He has a track that will hold 60 cars of coal, a side track. He will sell four sizes, and he is building up his surplus outside sizes he is making, and he fills up his side track. He is absolutely shut down. He cannot operate. He cannot put any more empty cars in there, and he cannot load any more, because if he arbitrarily holds that price on that coal, he is shut down. He cannot operate. If he has a contract to ship a man, under an agreement, a certain size of coal over a continuous period of time of twelve months, if he shuts his mine down arbitrarily and says, "I cannot sell this particular size," he is in for a law suit. He has to break the price on that coal, in order to move the coal. That is what I meant by not being able to maintain any price.

A seller cannot sell unless a buyer will buy, but if there is no demand for a particular size, and he has a demand for the other sizes, he has to (872) break his price. It may shift around, and be a diametrically opposite size the next time.

I have had no experience in buying coal in a situation where 73% of the production of a given territory has been combined in one agency. The only parallel case I know of

is just after the War. After I came back, I went back into the coal business, when coal was selling at around $21 a ton at the mines, and it was pretty hard to get a smokeless operator to sell it for less, but we did. I was purchasing coal at that time for a large consumer. We did succeed at times in breaking the price.

In the city of Spartanburg, where the evidence shows that in 1929, 99 and a fraction per cent of all the coal shipped into Spartanburg was shipped from the Appalachian territory, it is my opinion that if the price for that coal in Spartanburg were raised 20% by Appalachian Coals, Inc., that raise would have no effect on the price which non-members [fol. 646] would try to get for that coal.

By Judge Parker:

(874) Certainly it is human in every line of distribution of commodities to get as much for your product as possible. But I do not assume, I can not accept the assumption, that Appalachian Coals, Inc., can maintain a fixed advance of 20 cents a ton. But assuming, if you want to assume it, that they have done so, why, it would be natural for the non-member to get as near that price as possible.

By Mr. O'Brian

It has never been within my experience, or I have never seen where any group have ever been able arbitrarily to fix the price on coal Possibly the Chicago market is one of the most difficult markets we have in the coal industry. 259 million tons of coal are used there annually, within the switching limits of the city. It is natural that the smokeless operator is going to secure as great a price for his domestic sizes as possible. And they have endeavored from (875) time to time to try and secure a month to month price in that market. I do not know—well, unless the demand was very strong, I do not know that they have ever been able to maintain anything like the prices they were endeavoring to secure for their product. The demand, it seems to me, controls that situation.

No, when the increase in the price of coal comes, it will not begin with some one operator or some group of operators raising the price and having other operators follow. An increase in price usually starts in specialty coal.

Let us take the steel mills. The steel mills will accumulate an enormous bunch of unfilled orders. Their stocks at the present time are low. They will then go to the producer of by-product coals, both high and low volatile, and they will begin to buy in that coal. The first thing you [fol. 647] will know the coal trade will wake up and say: "These steel people want coal." The individual people I mean now, no combination, and he raises his price. The steel people want it. (876) The first thing you know that progress then goes on and on. This enables the other man to raise his price. It is so in the case of any commodity. So that when the price advances the operator raises his price because the demand is increasing.

Somebody raises the price, and that is the inevitable tendency, that other producers of coal naturally try to follow that price up so far as they can and at the same time sell their coal. That is true in the case of any commodity. And the beautiful part of that situation is that when your commodities are bringing a price where a man can make a living and then can have some margin of profit, the country as a whole is prosperous.

It would not be possible for any group of people to raise the price of coal at a time when other commodities were being sold without any raise in price. (877) It is my opinion, knowing the circumstances that no combination however great can fix the price of coal.

Redirect examination.

By Mr. Donovan:

If in a given territory the price of coal were raised by a combination strong enough to raise it, others would come in and obtain as nearly as possible the established price. But raising the price would bring other coal in and as other coal came in and more coals were available the price necessarily would go down. If, however, the demand were [fol. 648] sufficient it might be that the price would go up. What influences the price is the demand for the coal and the surplus or the shortage in coal as it may be. The modern plants equipped to burn high volatile coal are able to burn low volatile coal just as well. The old plants are not.

(878) A modern plant can burn one or the other, depending upon the use of the drafts. The old plants need adjustments.

I can give you a concrete example here: I purchase for two plants in east Tennessee. We burn low volatile coal in one, and when our delivered price on low volatile is as cheap or cheaper than southwestern Virginia coal, we change as the delivered price of the coal changes. We continually change that plant from low volatile to high volatile, or from high volatile back to low volatile.

Recross examination.

By Mr. O'Brian:

The plant I have in mind is four years old. It is a comparatively recent development. According to the information I gave the government, I have been purchasing from about 32 defendants and from about 5 non-defendant producers. It is difficult for me to know the mines exactly. You see, I buy from selling agents. For instance, (879) the Southern Coal and Coke Company, who may have twelve or fifteen mines listed in there, that you have in your list, that I do not recognize as to names. Of the non-defendant companies, I purchased from the Consolidation Coal Company, the Smokeless Fuel Company, (880) the United Central Collieries, Koppers Fuel Company, Mary-Helen and the Brookside Collieries. As a large buyer of coal I am in a more independent position than a smaller buyer.

[fol. 649] By Judge Parker:

(886) With reference to smokeless coal, the rate from the smokeless fields to North and South Carolina and the Piedmont sections is higher than the rate from Appalachian territory. Using Spartanburg as one point, it is 62 or 63 cents higher from the Smokeless field, than it is from southwestern Virginia, but as you get farther away from Spartanburg, the differentials begin to come together. At Charlotte, the difference is only 20 cents. As you go farther east from Charlotte, the differential begins to come together, and at Greensboro and Winston-Salem they are identical.

The reason there has been no greater use of smokeless coal in this territory is on account of the low freight rate

from southwestern Virginia and from Coal Creek, which is in the Appalachian territory. Coal Creek was the original coal freight rate introduced into that section, I think possibly before smokeless coal was ever brought into that territory.

With reference to the question whether the Alabama field offers any potential competition for the markets around Greeneville, Spartanburg, Charlotte, and that section:—
(887) During the British strike in 1926, I purchased considerable Alabama coal, which was shipped to Pelzer, South Carolina, Greenville, South Carolina, and Hartsville, South Carolina, by reason of the fact that two operators from whom we purchased our coal, one in Harlan and one in Southwestern Virginia, were unable to fulfill their obligations, and the price of coal had jumped to $7. a ton, if I remember correctly, and we were able to purchase a very good washed coal from the Black Creek section of Alabama, and ship it to those points with satisfactory results.

I cannot recall those Alabama freight rates, except into the upper end of Georgia, where I do buy coal. We handle [fol. 650] very little Alabama coal. I am not in daily contact with it.

The principal reason why we have not bought more Alabama coal is that we can get our coal from northwestern Virginia in about two days. We must also consider the quality. The southwestern Virginia and Harlan operators have maintained offices right in our community. It is very convenient. We get quick deliveries, and our freight rates, if I remember correctly, into Spartanburg, Greenville, and in that central section are lower from southwestern Virginia than from Alabama, and our normal market is southwestern Virginia.

(888) If this group of operators in southwestern Virginia and the Appalachian field, would raise the price of their coal, it would be possible for me to get my supply from Alabama. Whether the trade would turn to Alabama, and Alabama would offer substantial competition to southwestern Virginia in that event would depend entirely upon the amount of the advance. Five or ten or fifteen cents a ton would not make any difference. That is because we are in the habit of buying coal from Appalachian territory. But if they tried to raise the price substantially above a fair and reasonable profit on the cost of production we would

undoubtedly turn to the Alabama field, just as we did in 1926.

By Mr. O'Brian:

Defendants' Exhibit 3 shows that Alabama coal would have to pay a 35 cent a ton higher freight rate to get into Spartanburg than the Virginia district. (889) The rate from the Virginia district is $2.53 and the rate from Alabama is $2.87.

By Judge Parker:

If Alabama coal is washed properly and handled properly, it is just as good as the coal from Virginia. You have rather conglomerate beds of coal in Alabama. You have both the high and low volatile coals, but if they are [fol. 651] properly washed and produced they will come to the consignee in very good shape, and on a competitive basis.

The delivered price today of a ton of mine-run high volatile coal from southwestern Virginia, into Spartanburg, would run from $3.53 to $3.83. Pocahontas smokeless coal delivered into Spartanburg would run, today from $4.15 to $4.25. If the price were the same, the trade would probably lean toward the smokeless coal.

By Mr. Donovan:

(890) The price of high volatile slack delivered into Spartanburg would be $3.09, including surcharge, that is, 50 cents a ton at the mines, $2.53 freight rate, and 6 cents a ton surcharge.

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(891) J. M. Dewberry, a witness previously called on behalf of the defendants and who was duly sworn and testified, was recalled for further examination.

Direct examination resumed.

By Mr. Donovan:

I have obtained the number of cars of no bill coal standing on tracks as of July 16, 1932. I got these figures this

morning over the telephone from the Car Service Division of the American Railway Association at Washington. That organization receives them from the individual railroads and compiles them. And they were also confirmed in a telegram which I have since received.

[fol. 652] Coal in "no bill" cars is really stagnant coal for which there is no sale, and is standing around on mine tracks or in these holding yards, at various points over the country.

For all railroads east of the Mississippi River the total as of July 16, 1932, was 27,010 cars, equivalent (892) to 1,350,500 tons of coal. Of the 27,010 cars of coal, 10,328 were in the Allegheny region, or Western Pennsylvania; 7,954 cars were in the Pocahontas region, on the Norfolk & Western, Chesapeake & Ohio and Virginian Railroads; 5,754 cars were in the southern region, very largely on the Louisville and Nashville Railroad; and 2,974 cars are in the eastern region.

I might explain that on that same date the holdings of the Chesapeake & Ohio Railway were 3,673 cars; on the Norfolk & Western Railway, were 3,583 cars; and on the Louisville and Nashville Railroad, 3,162 cars. By Wednesday of last week, (893) the number of cars on the Louisville & Nashville Railroad had increased to 3,500.

From the same source I have ascertained that the amount of stagnant coal on hand at tidewater as of August 6, 1932, was 3,681 cars, equivalent to 184,050 tons of coal. Of these 3,681 cars, 2,295 were on the Chesapeake & Ohio, 894 on the Norfolk & Western, and 492 on the Virginian Railway.

Cross-examination.

By Mr. O'Brian:

I do not know whether that is a larger number of cars than at any time last year because the amount varies from day to day. The practice of railroads of setting apart certain yards for no bill cars is quite an old practice on some [fol. 653] railroads, on others not. On the Louisville & Nashville Railroad we will not pull a car off a mine track without billing. No bill cars on the Louisville & Nashville Railroad must remain on mine tracks.

(894) I think, however, that other railroads maintain yards for no bill coal cars. The Chesapeake & Ohio for

years, and also the Norfolk & Western. This practice has gone back a great many years, I would say as far back as 20 years. During a period of twenty years, it has been the practice on certain railroads to set apart tracks for these no bill coal cars. The practice of shipping coal in that way and having it await re-routing is an old practice, a very objectionable one, nevertheless.

The practice of the railroads in setting apart tracks for these no bill coal cars has been approved by the Interstate Commerce Commission. It got to a point where it was not only demoralizing the coal industry, but the railroad business as well, and the Interstate Commerce Commission took a hand in it about three years ago, at which time it was found there were over 20,000 no bill cars being held in Illinois. I think that was in 1929. (895) Some of those cars were held one hundred miles or more away from the mines on railroad tracks that had been arbitrarily named as mine tracks.

One of the reasons for this practice on the part of the operators was to get their coal to a point from which it could be quickly shipped to the probable destination. But at that particular time one of the big reasons was anticipation of interruption of mining in Illinois. They were permitted to mine coal to the extent that they could, and as fast as the coal was brought to the surface the railroads took it away. They were anticipating strike conditions, or something of that kind.

[fol. 654] (895) S. L. YERKES, witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Birmingham, Alabama, and am president of the Grider Coal Sales Agency. (896) I have been associated as a partner or officer of the Grider Coal Sales Agency for twenty-one years, and also during that period in other positions with individual coal companies, relating to sales, operation and executive management. I am now operating a coal sales agency which acts as the exclusive selling agent

for four companies, and part selling agent for three companies. Prior to the organization of this selling agency, I was in the railroad business for twelve years, with the Queen & Crescent Railroad from Cincinnati to New Orleans. I held various positions with that railroad and during the last five years of my connection with it I had charge of fuel purchases. I bought coal in West Virginia, Kentucky, Tennessee and Alabama.

From January 1, 1918 until March 31, 1919, I was assistant general director of distribution of the United States (897) Fuel Administration, in charge of bituminous coal distribution in the United States.

My duties in that office were concerned with matters of practical distribution. I saw first that the Army and Navy and other branches of the Government were supplied. And then the essential users as named by the Government as being those of first importance were supplied. After that, then the others. We had charge of all markets in which bituminous coal was distributed.

[fol. 655] The mines represented by my selling agency are located in Alabama. During the last five years the approximate annual production of the mines that my company represents has been around two to two and a half million tons per annum. (898) Their annual capacity is above three million tons. That capacity could be increased to 3,000,000 tons at a very moderate expense, and some of them at no expense.

(899) I am familiar with the coals produced in the Alabama field. Our coals vary in ash from 2 to 16%. From 12,500 to 15,000 B.T.U. Sulphur content varies from .5 to .2. Many of the coals produced in Alabama are almost identical with some of the coals produced in Appalachian territory. The B.T.U. content is the heat in a pound of coal required to raise the temperature of water 12 degrees Fahrenheit. Alabama coals are interchangeable for various uses with southern Appalachian coals. I think that Appalachian coals are interchangeable with coals from the southern Appalachian fields for all the uses. Metallurgical, steam, gas, ceramics, brick burning, and so forth. (900)

At the present time Alabama coals go to a very limited extent into South Carolina. Our largest market territory comprises the states of Georgia, Florida, Alabama, West Tennessee, Mississippi and Louisiana. We also ship to a

limited extent to southeast Missouri, Arkansas and Texas. We meet competition with coals from the southern Appalachian field in South Carolina, Georgia, Florida, to a limited extent in Alabama, west Tennessee, and to a limited extent in Arkansas.

Assuming that producers located in the southern Appalachian field, representing 75% of the present production of that region, have subscribed for stock in the Appalachian Coals, Inc., and have agreed to dispose of their coal exclusively through this selling agency, and at prices determined by it, I do not think that Appalachian Coals, Inc. would be able to set the market price for coal in South Carolina, for example; for the reason that the competition [fol. 656] within Appalachian Coals, Inc., would practically continue to exist as it now exists. I mean that there are many different grades of (901) coal produced within Appalachian Coals, Inc. Those coals because of being of different grades must be sold at different prices or the higher grade coal would move and the lower grade coal would not move, and the lower grade coal producers would certainly not permit that situation to continue long. He would insist upon a price on his product that would permit it to move. Therefore the competition within Appalachian Coals, Inc., would continue.

Then there is the competition of the coals outside of Appalachian Coals, Inc., in the same region, plus the competition of coal from other regions, and plus the competition of hydro-electric power, and fuel oil on the coast. I mean to say that even though Appalachian Coals, Inc., was set up and served these various defendants, there would still exist competition among those defendants for the sale of their coal through this agency. That works so in the agency which I operate.

By Judge Parker:

Take this illustration: two mines working on the same seam of coal, and probably near (902) by or may be separated thirty or forty miles. One, because of the structure of the coal, the coal being soft, produces only a steam grade of coal. The other mine, because of hard structure, produces domestic sizes as well as steam sizes. Now suppose that the operator producing the steam grade only sells

his coal at a very low price and the producer selling the — producing the domestic and the steam grades elects to sell his steam coal at a very low price. He does not move his steam sizes. At the same time he has a market for his domestic sizes. Well, he cannot run and ship his domestic sizes unless at the same time he is enabled to ship his steam [fol. 657] sizes. Well, he is not going to remain in that position long. I am assuming that prices are being named by the agency to begin with. He is going to the agency and demand a price on his steam coal, that will move it so that he can run at the same time that his competitor who produces only steam coal can run.

He is not going to remain with the agency very long if the agency fixes a fictitious price on his product that won't move it.

By Judge Northcott:

(903) It is entirely true that mines in regions somewhat separated mining the same class of coal claim superior qualities for their coal that they have mined over coals almost similar and that there is a good deal of competition between the mines in that way, as to which mine produces the best coal for, say, domestic purposes.

Every operator makes an effort to build up a trade for his particular coal. That will continue to exist, within the agency, for as was testified to by Mr. Francis, there will be many sub-agents who now have the goodwill, the knowledge of the trade, the knowledge where their coal is preferred as against another coal. Those men will still continue to operate within the agency and push particularly the sale of their own coal under the trade names and brands that they were formerly using, and with their former customers.

Under this plan competition between the member companies would still keep up as to the sale of their coal for the reason I explained a little while ago, that you cannot (904) fix a fictitious price on any one coal, or any two coals, and move one and not move the other, and have the man whose coal is not moving remain satisfied.

[fol. 658] By Mr. Donovan:

If there were a great supply of one grade of coal, so that the price came down, the price of that grade of coal

undoubtedly would affect the price of other grades of coal held by the agency, because, if that coal on which the price came down was a superior product, and the trade knew the quality of the coal, both the buying trade and the selling trade, the selling agent certainly would not sit by with a higher price on a lower grade of coal. They would put their prices on a competitive basis.

Alabama is not an important factor in the South Carolina market today. Prior to about 25 years ago, Alabama was an important factor in the South Carolina market, and a limited factor in the North Carolina market. At that time, and for some years afterwards, Alabama was suffering from severe car shortage, to such an extent that some of the railroads placed embargoes on the movement of their cars into the Carolinas, because it took (905) a greater time for the cars to move, and when they did get into the Carolinas, they did not come back to Alabama empty. They went to the Virginia or West Virginia coal fields.

As a result of that, Alabama had to look to nearby markets, where their cars would be unloaded and come back to the mines. Gradually, the increased production in Virginia and in East Kentucky and Tennessee, coupled with complaints about the rate structures on the part of consumers, and backed by the railroads serving Virginia and not serving Alabama, a rate structure was created where differentials apply against us today, that make it almost impossible for us to get in. We ship some specialty coal only into South Carolina at this time.

What I have said is true to a greater extent in North Carolina than in South Carolina, because as you leave Alabama, going into North Carolina, your distances increase [fol. 659] against Alabama and in favor of Virginia, Eastern Tennessee, and Kentucky.

Appalachian Coals, Inc., would not have the power to set the market price for coal in Georgia. This is true because of the competition, first, within themselves; second, from non-defendant companies in the same region (905) third, the competition of other coals in Tennessee which are not in Appalachian Coals, over on the N. C. and Saint Louis Railroad, for instance; competition of coal from Alabama; competition of fuel oil on the South At-

lantic Coast; hydro-electric power, and natural gas in the interior.

The freight rate from Alabama to Georgia compares with the rate from the Appalachian region as follows:— Taking Atlanta as a typical point, the base rate from Alabama is $1.92. The base rate from the nearest portion of the Appalachian District, the Coal Creek District, is $2.09, or 17 cents in favor of Alabama for a distance of about 40 miles.

From my experience in the sale of coal in the markets where it competes with substitute fuel such as gas, hydro-electric power and fuel oil, I would say that these substitutes, where present, are a practical and an absolute check on the ability of the producer of coal to materially increase his price. In our experience in our territory, which is probably the most competitive territory in the United States, and has so been for 25 years, we have not only been able to raise the price, but in many cases we have been forced to reduce the price in order to retain the business against the competition of either hydro-electric power, natural gas, or fuel oil.

(907) Appalachian Coals, Inc., would not have the power to put my company out of business. They have not power enough to go into Georgia or any other market territory we enjoy, and make a price that we would not meet and go along with them. For the same reasons I do not think [fol. 660] that Appalachian Coals, Inc., has the power to put its competitors generally, or any of its principal competitors in any market where it meets those competitors, out of business.

I doubt that the organization of Appalachian Coals, Inc., would have any effect upon the price of coal in North and South Carolina and Georgia, until such time as there might be a rise in the whole market and the price would go up then. The increase in price would be determined by conditions and not by Appalachian Coals, Inc., and by the demand for coal.

Cross-examination.

By Mr. O'Brian:

I was present at the New York meeting and voted to approve this general sales agency plan (908). I was desig-

nated by the chairman of that meeting as a member of the committee to recommend its adoption, and secure its adoption if possible in Alabama.

My explanation for the fact that we are unable to sell a larger amount of coal in Atlanta, for example, in competition with Appalachian territory, where we have a freight advantage of 17 cents, is because of the lower prices that they make, some of which because of higher costs at some of our mines, we cannot meet.

Q. So that is a factor as well as the freight rate, in your meeting competition of others in Georgia?

A. It is in all markets.

In order to sell coal in Spartanburg, South Carolina, Alabama coal must overcome a freight disadvantage of 34 cents. If the South Carolina market became the least bit attractive to us by reason of higher prices from the Appalachian field, we would attack this freight rate structure, and endeavor to get a better adjustment. That is, we would go to the Interstate Commerce Commission. But on the existing rate structure (909) we would have to overcome a 35 cent disadvantage to get into Spartanburg on the larger part of the tonnage.

[fol. 661] Georgia is a very natural market for Alabama coals. We do not sell so much coal in Eastern or Northern Georgia, but we do in Southwestern Georgia. As shown by defendants' Exhibit No. 1, in 1929, the total production in Alabama was some 17,700,000 tons. Of that amount there was consumed within Alabama 9,118,000 tons. I would like to state that the large consumption within the state of Alabama is because of the steel and iron industry consuming its own coal-captive tonnage, so-called. Defendants' Exhibit 1 shows that of the (910) 17,700,000 tons produced in Alabama in 1929, only 459,000 tons were sold in Georgia, 341,000 tons in Florida, 293,000 tons in Louisiana, 884,000 tons in Mississippi, 145,000 tons in Tennessee.

That is not generally typical of the competitive situation, for the reason that beginning about four years ago, this fall, natural gas was first introduced in New Orleans, and since that time, in New Orleans alone, Alabama operators have lost 700,000 tons a year to natural gas. Taking our market territory in the Valley as a whole, including

Georgia, we have lost to natural gas, in the past four years, at the rate of 3,000,000 tons per annum. (911)

This estimate is based on an actual survey of the plants that have been converted from coal to gas. I do not mean 3,000,000 tons in Georgia, but a loss of 3,000,000 tons per (910) annum in the whole market territory that we serve. In Georgia, so far, we figure we have lost between 400,000 and 500,000 tons. That total loss of 400,000 to 500,000 tons in Georgia is shared in by Alabama and the Appalachian territory. I mean that, so far, all the coal operators have lost that amount of tonnage.

[fol. 662] I do not have the figures for our sales from Alabama in 1930-1931. I imagine somewhere around the half-mililon ton figure you have stated for 1929. Yes, the Alabama fields enjoy a freight advantage into Atlanta, Georgia of 17 cents a ton. Defendants' Exhibit 2, page 125, shows that there was shipped to Atlanta (912) of all the coals, 85.67 per cent from the Appalachian territory, and from Alabama came only 6.46 per cent of the coal that was used in Atlanta. I knew our amount ran from 5 to 10 per cent, but I had not seen those figures.

In speaking of competition continuing between the defendants who are in the agency, I understood that the price at which the selling agency sells any of the coal of its members is within the exclusive power of the selling agency to fix.

I also understand that so far as the power element of price competition is concerned, the defendants vest in the selling agent the exclusive power to fix the prices for the coal, whether the order is allotted between one defendant or another.

Re-examination.

By Mr. Donovan:

(913) In my own selling agency the power to fix the prices for coal is practically vested in the agency. We fix our prices for our different operators, the price of my company, based upon consultation with them as to market conditions, competitive factors, etc.

The agency has the exclusive power to determine the price, but we all know as a matter of business practice that

if any radical change is proposed, they are certainly going to consult with the principals, the men who produce the coal.

[fol. 663] By Judge Soper:

Assuming that ten grades of coal are handled by this sales agency, that each grade will have a certain market value, and that the sales agent observes a full differential, so to speak, between the various grades of coal, there would still be competition between those various grades within the agency in the following way: If you went to a buyer who could use any one of those ten grades of coal, and you gave him his choice at these varying prices, and he elected to take the coal he wants, the next (914) man would do the same thing. That would continue the competition. That is what I mean by the competition being continued within the agency.

By Judge Parker:

Q. Let me see if I get that point clearly; there are certain kinds of competition between red gas, yellow gas and green gas of the Standard Oil Company, but I do not suppose the Standard Oil Company cares which kind you buy. The men who manufacture it for them, may take some pride in the amount they turn out, but I do not suppose the Standard Oil Company cares about that. You do not refer to that as competition, do you?

A. There is this difference. The Standard Oil Company produces and sells all those four grades, whereas in the instance we are speaking of here, you have ten grades of coal produced by ten producers, or maybe you have 137 grades of coal produced by 137 producers. Well, now, the producer is not the same, and if sales are made for the kind of coal produced by one man, and the others get no business, they certainly are not going to sit still on that price basis. They will demand a change.

Q. Your idea is this: That if they had those ten grades of coal priced at certain prices, and at that price for stove [fol. 664] coal it is being moved, and a lower grade of coal was not being moved, that the producers of the lower grades of coal would demand that they lower the price (915) of their grades so as to move them?

A. Absolutely.

Q. And when they have lowered the price of that grade, that grade would begin to move, and probably then stove coal would not move, and then they would have to lower the price of stove coal on the demand of the producers of that grade of coal, is that it?

A. Yes sir. Now, that goes back to this so-called dumping practice and no-bills. I should like to make this statement on that, if I may, please.

By Mr. O'Brian:

About the same time that this competition of fuel oil and natural gas in the southwest began, say 25 years ago, roughly speaking, and then extended on east by degrees, coal was sold generally in one or two forms. That is, bituminous high volatile coal. That is, either as straight mine-run coal, or as six-inch steam coal and six-inch lump coal for domestic purposes. Beginning with the competition of oil and gas, however, research on the part of coal operators and manufacturers of coal-burning equipment, caused them to realize that refinements in the burning of coal were going to be necessary, in order to meet this new competition, which had been unknown, as coal had been a monopoly up to that time for heat and power.

In the development of this coal-burning equipment, stokers particularly, and followed by powdered fuel installations, the operators began to refine their sizes, to where now some of them make half a dozen grades. You will have a strong market on one grade of coal, and maybe you may have no market on (916) another grade, or a little market [fol. 665] on it, and a slower market on down to where you have no ability to move one of your grades of coal. Your tracks begin to be blocked with that grade. Then that causes dumping, that has been discussed here by different witnesses.

By Judge Soper:

If all the bituminous coal in this country were owned by one company, I think the competition from fuel oil, natural gas and power, would prevent raising the price of coal beyond possibly a reasonable figure, if that man wanted to stay in business.

By Mr. O'Brian:

(917) Assuming the organization of Appalachian Coals, Inc., the organization of a similar Alabama agency, and a similar Smokeless agency, I think their effect would only be a slight one in Georgia and South Carolina, because the other competitive factors and substitute fuels would prevent artificially putting up the price beyond what the normal increase of the demand in the market would justify.

I think that under that situation there would be some effect on the market, but the degree to which the market would be affected, that is the degree to which the price would rise, would be controlled in my opinion by the other competition that I have just described, because in the past when we have had runaway markets due to strikes and car shortages, when business came back to normal and you get your cars back, or the strikes were settled, invariably the coal operators have lost business to these competitive forms of fuel, and I think today if we had the opportunity we would not raise the price to where we would wind up losers. We have in the past raised our price beyond what I think is a reasonable price.

[fol. 666] I am afraid you will see gas in North Carolina. (918) We thought we never would see it in Georgia and Alabama, that is, natural gas. There is no natural gas now in North Carolina. The organization of Appalachian Coals, Inc., might be able to have some small effect on the market, but it would be slight.

By Judge Parker:

Q. The practical effect of unrestrained competition over a long period of time or in the long run in an industry—that is, competition within the industry—is to hold the price around the cost of production, isn't it?

A. Yes sir; either slightly above or slightly below.

Q. Yes. If it gets much above the cost of production the competition will increase and bring it down. If it gets below a number of operators will be forced out of business and it will come back. Now competition between industries does not work that way, does it?

A. No sir, it does not. (919)

Q. The effect there in the long run is to drive the inefficient industry out of business—in the long run? That is

to say, if energy in the form of coal can be produced cheaper than energy in the form of gas, coal will drive gas out of the territory?

A. Or vice versa.

Q. Yes. Now has that happened anywhere within your observation of the competition between industries?

A. Well, I can give you one or two definite examples of the competition between natural gas and coal.

Q. Well, that is what we would like to get.

[fol. 667] A. At New Orleans four years ago this coming fall when natural gas came in there Alabama supplied all of the large industrial consumers. For instance, the American Sugar Refining Company, the Public Service, which is a public utility, and others. Our contracts were up for renewal. They told us what the price of gas was. We figured out what the price of coal had to be to meet that competition. We reduced our part of it as far as we could. Then we asked the railroads to reduce their rates, which they declined to do, and we lost the business.

At Gulfport, Mississippi, recently, the Mississippi Power Company, which is an allied company of the Alabama Power Company, had been burning Alabama coal for twenty-five years, with the possible exception of a year when they experimented with fuel oil. They are now on Mississippi gas. We could not meet the competition.

By Judge Soper:

Taking relatively large regions or states (920) there will not be complete displacement of one source of energy by another, for the reason that there are certain factories that require coal in processing, where gas or oil or electricity can not be substituted entirely. But when you take the southwest into consideration—you take Texas, which originally started out on fuel oil in the old Beaumont field in 1900, Texas is now a network of natural gas lines, and fuel oil, along with coal, has suffered in Texas in competition with gas. The same applies in Oklahoma. In those states all three fuels are being used, but coal the least of all.

By Mr. O'Brian:

In my opinion a reasonable price means a price fixed by competition, and anything which would artificially restrict competition would be likely to affect a reasonable price.

[fol. 668] (921) WILLIAM G. POLK was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

(922) I live in Knoxville, Tennessee. I am vice-president of the Tennessee-Jellico Coal Corporation, and resident manager for Walter Bledsoe & Company, in charge of sales in the south.

The mines of the Tennessee-Jellico Coal Corporation are all located in Campbell County, Tennessee.

Walter Bledsoe & Company act as sales agents for two mines in the Harlan, Kentucky, field, and Mary-Helen Coal Corporation, and the Clover Fork Coal Company. Walter Bledsoe & Company own and operate mines in Indiana and Kentucky, also one in Tennessee. They also act as sales agents for mines in Illinois, Indiana, Kentucky and Tennessee.

In the states of Kentucky and Tennessee, it is customary in most all cases for coal companies owning mines to sell their coal through selling agencies. The condition that brought this about was: The average coal mine in Kentucky and Tennessee, particularly, does not mine sufficient tonnage to justify them in keeping a large sales force in the wide territory in which they have to market their coal, and it is cheaper for the operator (923) to market his coal through a selling agent who has the facilities for marketing his product. This condition has been true ever since I have been in the coal business, for about 20 years.

[fol. 669] The average annual production of the mines of the Tennessee-Jellico Coal Corporation from 1920 to about 1925 was approximately 175,000 tons. Since that time, the production has increased to about 250,000 tons. We could double our capacity. At two of our mines, this would involve no expense. At the third mine there would be a reasonable expense to double the tonnage. At our Anthrus mine we produce a block and an egg size for domestic and household uses, and a nut and slack which goes for steam and manufacturing purposes. These grades are equal to

any of the coals produced by other companies in the southern Appalachian region.

(924) The Walter Bledsoe Company acts as exclusive selling agent for other coal mines located in the southern Appalachian region. We are sales agents for the Mary-Helen Coal Corporation, the Clover Fork Coal Company, and also New Jellico Coal Company, at Morley, Tennessee. I am familiar with the organization of Appalachian Coals, Inc. I was asked by one of its representatives to contract with it for the sale of coal produced at the mines of the Tennessee-Jellico Company. We did not enter into any contract with Appalachian Coals, Inc., either through our selling agent or as a sub-agent or on behalf of our mining interests.

Our reasons were these: Speaking for the mines in which I am personally interested, (925) we have two mines that have had contracts on railroad fuel for several years past, and we could not see any advantage in paying the selling agent a commission to sell that coal for us. In the case of the other company, we were entirely satisfied with our present selling agent, because they have wide facilities for marketing coal, and have given us good results, and we did not feel like making the change on that account.

[fol. 670] Last year the New Jellico Coal Company, located in the Jellico district in Tennessee, which is controlled by Walter Bledsoe & Company, produced approximately 150,000 tons. It is already equipped to produce 2,500 tons daily. That would be about 400,000 tons per year. We have figured that we have a life there on a basis of 2,500 tons, of approximately 50 years.

Two of the mines owned by the Tennessee-Jellico Coal Corporation sell their coal on contract to the Southern Railway. The other mine ships coal into the north, the northwest, into Tennessee, part of Alabama, Georgia and North and South Carolina.

(926) I am fairly familiar with competitive conditions in these various markets. I have travelled in both the northern and southern territory, selling coal. From my knowledge of conditions in the selling territory, I would say that coals produced by the Tennessee-Jellico Company come in competition with coals produced in other regions. We meet strong competition everywhere we go. There is

no place that we go that we do not find competition. In the northern territory we meet competition from Ohio, Indiana, Illinois, West Virginia and Pennsylvania. Our freight rate is higher into that territory, but we still get in there on account of the quality of our coal, and the structure of it, which makes it a good coal for a dealer to handle.

In North and South Carolina we come into competition with coals from Virginia and West Virginia. In the Carolinas, we do not come in competition with any coals from western Kentucky. The coal produced by the Tennessee-Jellico Company is interchangeable with coal produced in other regions with which it comes in competition, for all practical purposes.

[fol. 671] (927) The markets in North and South Carolina are closer than the markets in the north and northwest, and have more favorable freight rates, but they are not closer than Kentucky. In the event that Appalachian Coals, Inc., should raise the price of coal in the Carolinas or in Georgia, it would certainly be to our advantage to divert the coal that now goes into the north and northwest markets to the Carolinas and Georgia.

The reason why at the present time we sell such a small percentage of our coal in the Carolinas and Georgia is that we have in the eastern Carolinas some differential in freight against us, as compared with Virginia and West Virginia, and also due to the fact that we find the competition very keen, and we have only been in this market about five years. We compete in that market and attempt to get in there. We are (928) making a strong fight for all the business we can get in that territory. We keep a salesman who travels North and South Carolina steadily.

Of the coal which is produced in Harlan County and sold through our agency, I would say that 50% is sold in the Carolinas and Georgia. In the event that Appalachian Coals, Inc., should attempt to raise the price in that territory, it would be to our advantage to sell an increasing percentage of the Harlan County coal. We would like to get in with more Harlan coal in this territory. I do not think that Appalachian Coals, Inc., would have power to put my company out of business. It certainly could not wage a competitive war against any of its competitors in that territory without involving all other companies that sell in competition, because they have members over in

our territory, (929) and they would have to suffer any competitive conditions that we have to meet.

[fol. 672] The Tennessee-Jellico Coal Company, the Block Coal & Coke Company, with two mines, one at Block, Tennessee, and one at Turley, Tennessee, are all located in the Appalachian territory.

Cross-examination.

By Mr. O'Brian:

We had only one mine which shipped coal into North Carolina, South Carolina and Georgia in the year 1929, because the others went to the railroads. (930) I should say perhaps, and this is a mere guess, that 15 or 20% of the volume of the coal shipped from all our mines went into those states. Our production was 120,000 tons last year, and the most of that coal was that which came into the Carolinas, or domestic. We did not ship any steam coal. From our own mines I would say that in 1929 we shipped 500 cars, or about 25,000 tons to the states of North Carolina, South Carolina and Georgia.

The Walter Bledsoe Agency has sold other Appalachian coals belonging to other people. I am the manager of the (931) southern office of that agency. I would say that Walter Bledsoe & Company in 1929 shipped from 350,000 to 400,000 tons of coal into the States of South Carolina, North Carolina and Georgia, into these three States as a whole.

When I stated that our present selling agent was satisfactory to us, I was speaking for our own mine-, and from one of them coal is sold by the Walter Bledsoe Company, and the other two mines sell their coal to the railroads direct. I meant that we were entirely satisfied with our selling agent, the Walter Bledsoe Agency, of which I am the southern manager (932).

By Judge Soper:

Fixed carbon is the amount of carbon in coal or the [fol. 673] percentage rather. Fusion of ash is the temperature at which the ash will fuse and run together when it is being fired under the boiler. Some plants require what they call a high fusion point of coal, because they run their

boilers under great pressure, and the stronger you fire a boiler, the more apt the ash is to fuse and run over the grate bars, and stop the draft. Other plants can use a very much lower fusion point in coal. The more carbon in coal the better.

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(933) JOHN C. COSGROVE was called as a witness on behalf of defendants and, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Donovan:

I have been in the bituminous coal business for about 25 years. I live in Johnstown, Pennsylvania. I have been identified with different banking institutions, more particularly, I have been a director in the Philadelphia Federal Reserve Bank. I am a director there now and have been for ten years.

I am president of the Cosgrove-Meehan Coal Corporation of Pennsylvania and the Cosgrove-Meehan Coal Company of Illinois, and the Rachel Gas Coal Company of Northwestern West Virginia, and of the West Virginia Coal & Coke Corporation, one of the defendants here. (934) The others are not defendant companies. The annual production for 1920 of the Illinois and Pennsylvania companies, was about 900,000 tons. That shows a gradual increase to about 1925 or 1926, when it went up to about, well, between two and a half and three million tons. The [fol. 674] Rachel Gas Coal Company, located in northern West Virginia, in what is known as the Fairmont district, was not in existence until 1927. It has a production of between 300,000 and 450,000 tons for the years since its organization. The production of all three of these companies for the year 1931 was a little over 2,000,000 tons. The production of the West Virginia Coal & Coke Corporation in 1931 was a little under 3,000,000 tons.

These coals vary all the way from low volatile smokeless coal to the high volatile coals. In other words, there is low volatile, medium volatile and high volatile. They are equal in grade and quality with the coals produced in the Southern Appalachian region.

(935) There is always a constant change in the use of coals by the consumer, influenced by various reasons, perhaps price more than anything esle. We get new customers who were formerly purchasing coals from our neighboring competitors, or from other districts. There has been a great deal of interchange of coals from the eastern fields, and from the Illinois fields. There are interchanges going on in the eastern United States, along the Atlantic seaboard, as between high volatile and low volatile coals all the time. As a matter of fact that is a constant process (936).

I say these coals are interchangeable, because they are used by the same customers and for the same purposes. The steam plant will use a coal from central Pennsylvania for a period. They will switch to a coal from West Virginia, or a coal from western Pennsylvania, or if it is farther west they may use a coal from southern West Virginia or from northern West Virginia. The Fairmont coals and the Appalachian coals are frequently changing; the same consumer changing from one to the other. The same thing applies to Illinois coal. The principal factor in the change is price—the cost per pound of steam produced.

[fol. 675] We sell our coals substantially in all the markets north of the Ohio River from Iowa to Maine. We do not sell coals from all of these mines in all of these states. Due to distance and freight rate limitations, some of the coals do not move in all the territories. The coal which is most widely distributed is the coal from central Pennsylvania smokeless fields, which is distributed all over this territory. The coal that is probably next most widely distributed is the coal from southern and northern West Virginia.

I am familiar with competitive conditions in each of these markets. As chief executive of these companies, I have of necessity had to familiarize myself with the competitive conditions in these markets. (937) In each of these markets there is active competition between these coals and coals from the southern Appalachian region.

My explanation of interchangeability explains why there is competition between different coals. But we have customers that are using coals from several fields at the same time. I can give you an example. For instance, the Block

Coal Company has eleven coal yards in Iowa and northwestern Illinois. Now they use coal from the Appalachian district, they use west Kentucky coal, they use Iowa coal, Indiana coal, northern West Virginia coal and Pennsylvania coal.

The railroads are also a good example. Take, for instance, the Nickel Plate Railroad. They buy coal in Illinois, Indiana, Ohio and northern West Virginia. There are many other similar instances. I think that statement about that railroad applies to quite a number of the railroads. In all markets that I know there are a number of coals that are interchangeable.

[fol. 676] (938) Assuming that producers located in the southern Appalachian region representing 73% of the present production of that region have subscribed for stock in the Appalachian Coals and have agreed to dispose of their coal exclusively through this agency at prices determined by it, I do not believe that Appalachian Coals, Inc., would have the power to put my company in Illinois, which is selling in Indiana and that territory and in Central Pennsylvania, out of business.

In explanation of that I might say that I cannot see that the Appalachian Coals, Inc., gives to the operators any competitive weapon that they do not now have. The matter of cost of production, the amount of loss, perhaps I should say, that any company can stand, seems to be the important factor in how far they go or how difficult they make the competition. I cannot see that there is anything added or that Appalachian Coals, Inc., is so constructed that they can do anything that would be harmful.

With reference to the probable effect of the organization of Appalachian Coals, Inc., upon producers of coal located in the territory in which our mines in Illinois and central Pennsylvania are located, I think that the organization of Appalachian Coals, Inc., would be a matter of great encouragement to the industry all over the east. There has always been a (939) common gibe at the coal industry that it was impossible for them to cooperate together in any way. That the only kind of business they knew and could do was cut-throat business, destructive business. And I believe that if an organization of this kind or a grouping together

of a number of operators could become effective, it would be a very encouraging sign and a helpful sign.
[fol. 677] It couldn't have any very great effect among the producers themselves outside of what you might call psychological effect.

By Mr. O'Brian:

Moral effect, perhaps, depending on, of course, the sense in which you use that word "moral". But after all this is a comparatively small part of the total tonnage. By comparatively small part of the total tonnage, I mean, that the production of coal in the eastern United States is very large. Many times the production from the members of Appalachian Coals, Inc.

I have information as to the cost of production of the West Virginia Coal and Coke Company as compared with sales prices. I happen to have with me the cost statement and the selling price for the month of June, 1932 and for the six months of 1932 to date. (940) I would be willing to state what that is. For the month of June, 1932, the cost of production of the West Virginia Coal and Coke Corporation was $1.24. The sales price of the coal, which we ordinarily call total realization, being the total amount received for the coal at the mine, without including any freight, was 87.7 cents. The cost of production for the six months of this year was $1.34 and the total realization was $1.02-7/10 cents.

The West Virginia Coal and Coke Corporation has never made a profit. In 1928 this company went through a reorganization. The West Virginia Coal and Coke Company was in financial difficulties. It had a very heavy capital structure. It had put out an issue of $10,000,000 of bonds, which at the time of reorganization stood at slightly over $9,000,000, and they (941) had a total value for their plants [fol. 678] on the books of between $20,000,000 and $25,000,000. They were unable to pay the interest on the bonds, and were thrown into receivership. Thereafter there was a receiver's sale, and the properties were bought in by a committee at a price of approximately 1-½ million dollars. The properties then were reorganized into the present West Virginia Coal and Coke Corporation, which started business in the fall of 1928. It has not made money since its reorganization. (942)

As a director of the Federal Reserve Bank of Philadelphia, I have a general knowledge of what is going on in the coal fields, which come within the area embraced by the Philadelphia Federal Reserve Bank. As a director, I am regularly supplied with a great amount of information on the trend of credits in various industries. I have had before me the studies and reports, and the matters come up for action by the board from time to time. For the past 5 or 6 years the trend of values has been downward. The credit of the coal companies is at the present time at a very low ebb. The amount of eligible paper which is offered to the Philadelphia Federal Reserve Bank from its members in that district has been on the decrease, until the present time, when it has almost disappeared.

There has been a downward trend in all industries, but at a much more rapid rate in the coal industry, than any that I can recall. (943)

Cross-examination.

By Mr. O'Brian:

I attended the Cincinnati meeting at which Appalachian Coals was organized. I am an officer of one of the defendant producers. At the meeting in New York, I think I was designated as a member of the committee to organize [fol. 679] one of the recommended sales agencies. I am not sure of the designation, because I really never functioned on any committee. I am not certain in what field I was to function. (944)

With reference to the cost figures I have given in the month of June, the depreciation and depletion amounted to 18.3 cents per ton. For the six months the average was 13.3 cents per ton. The company has never made a profit.

Q. Defendants' exhibit No. 5, which is in evidence, whows that in the year 1930 your cost of production per ton was what? (944)

A. I do not know.

Q. Will you look at that?

A. Is it on here.

Q. Will you examine that? (945)

A. I never saw this before. Let me look at it.

Q. This is an analysis of your published statement, put in by the defendants.

A. This is for the year 1930.

Q. Yes.

A. There is no cost per ton there.

Q. What does it show as your loss per ton. Is not that the figure there (indicating)?

A. I do not think so. I do not know what that means.

Q. Does not this exhibit 5 show that in the year 1930 your net loss per ton was 2.95 cents?

A. There is an item here which says "net ordinary profit, 2.95 cents."

Q. In parenthesis?

A. I am not able to tell you whether that is what it means.

[fol. 680] Q. Perhaps I can help you. The profit, before depletion, is shown on this Exhibit 5, for your company, for the year 1930, is it not, at 10.87 cents per ton?

A. Yes, sir.

Q. Against that is a charge-off for depletion, amortization and depreciation of 13.82 cents per ton?

A. Yes, sir.

Q. Leaving a deficit, or a loss per ton of 2.95 cents.

A. Yes, sir.

Q. And for the year 1931 this statement shows the profit per ton before depletion, and so forth, at 9.26 cents.

A. Yes, sir.

Q. And the most of that charge, for obsolescence, depletion, and so forth, represents 16.62 cents per ton? (946)

A. Yes, sir.

Q. Leaving a net loss for that year of 7.36 cents per ton.

A. Yes, sir.

My company does not appear on that exhibit for the year 1929.

By Judge Soper:

1929 was generally a good business year, but the coal industry did not share to any appreciable extent in that good year.

By Judge Parker:

I think that was due to unrestrained and ruinous competition among the various coal producers, and to compe-

tition from outside industries. It was along about 1927, 1928 or perhaps 1929, that large pipe lines from the southwestern gas fields were built and came into the market extensively (947) and not only took away consumers for coal, but very much upset everybody concerned. I think in many cases coal operators were afraid to try to main- [fol. 681] tain, or to try to get better prices, for fear they would drive out the demand for their coal, and I think it was in many cases used by buyers to get prices down.

By Mr. O'Brian:

I am making that statement from memory and it is a very general statement. I do not have the exact dates in mind, except the general statement that that was about the time of the building and the expansion of that industry. For instance, they were built into St. Louis, which is a large consumer of coal, and displaced a large amount of coal. They were built into a great many Western cities. They were built into Kansas City. I do not know when the line got into the Chicago territory, but I think it was about 1929.

I can give particulars as to my own companies, more or less definite. In the St. Louis market, we lost a large amount of tonnage. I mean by that several hundred thousand tons. One large consumer was the Granite City Steel Company, located just outside St. Louis, I think, on the Illinois side of the river. I happen to recollect that particularly large user. (948)

I recall Cincinnati, Ohio, as a point at which our companies lost business to natural gas. In 1929 the coal we sold in Cincinnati was from the southern Appalachian fields, from the defendant companies which I represent. To the best of my recollection we sold in Cincinnati in 1929 approximately 500,000 tons of coal. The principal industry in Cincinnati, which put in natural gas in that year, and the one which I remember was the Union Gas & Electric Company, in one of their power plants. That plant had for some time been one of our customers. We lost in that year to that customer from 50,000 to 100,000 tons. That is as near as I can remember. I am not very positive. I have not had occasion to refer (949) to it for some time. I cannot recall any other specific point at which any of our companies lost business.

[fol. 682] We have properties in the central Pennsylvania district. We shipped very little of our coal from this district into Michigan in 1929, although I have no figures to support the statement. The tonnage which we shipped in 1929 from central Pennsylvania into Michigan, northwestern Ohio and northeastern Ohio was comparatively small. The larger part of it would be into Ohio, but it is not a large tonnage in the total. In our case I do not think it was as much adverse freight rates, as it was establishment of business relationships. From central Pennsylvania, we were always principally eastern shippers.

(950) In 1929, the shipments of our central Pennsylvania coals to the Great Lakes were very small. Possibly it might be as much as 5,000 tons, but very small. It was a negligible quantity. Yes, in that year our coal was not a serious competitive factor, either in the matter of lake shipments, or in Michigan, northwestern Ohio or northeastern Indiana; only so far as we have a surplus quantity of coal which we would be glad to ship into that market. I think you have two kinds of competition in coal, the coal that is actually sold and coal ready to be sold if a customer will buy. (951) My conclusion is that the coal we had ready to sell was a competitive factor, because had the market been willing to take it, we would have been willing to ship several hundred thousand tons of coal. If the market was ready to take it, we could have shipped all our coal, theoretically speaking, into that territory, but not practically.

No, it is hardly correct to say that our natural market for central Pennsylvania coal is now to the east of the central Pennsylvania fields. But the market which has been most developed has been in the east. We go into Chicago, Indianapolis and points like that, on an equal or substantially equal freight rate basis with the smokeless district of West Virginia.

Either in 1929 or 1930 we shipped a little coal to Indianapolis. We ship every year some coal into Chicago. [fol. 683] Yes, the amount of coal which we shipped in 1929 or 1930 or 1931 into any of that Michigan, northwestern Ohio, northeastern Indiana or Chicago territory is negligible. During these three years, we did not ship any coal from central Pennsylvania into the Carolinas or

Georgia. That is not our natural market. (952) It is hardly available under any circumstances.

Eliminating our coal from central Pennsylvania, and Illinois, substantially all of the production from the Rachel Gas Coal Company, which is the northern West Virginia Company, went into the territory which is marked (2) on the map. (Defendants' Exhibit 9) But I have no figures to break that down between the three States in that general territory.

Very little coal of the West Virginia Coal and Coke Corporation moved into the southeastern territory. We formerly had an office in that territory and tried to cover it, but the amount consumed is so scattered—what we would call thin territory—that we gave that up, and arranged with a sales agency to represent us in that territory. (954) We have not sold much coal down there.

In the last three years our Illinois coal has been delivered principally in the St. Louis, Chicago and Illinois markets, the territory north and west of Chicago and a considerable tonnage in the Illinois-Ohio part of the territory marked number (2) in Defendants' Exhibit 9, that is south of Chicago and east of Chicago, in the southwestern part of territory (2).

The West Virginia company is one of the defendant companies, and you asked me if the coal went into the southeast territory, and I told you practically no. And the rest of it went in to the usual competitive territory.

Redirect examination.

By Mr. Donovan:

The balance sheet shown in Defendants' Exhibit (955) [fol. 684] 5 is the consolidated balance sheet, including the parent and subsidiary companies. It includes returns from activities other than mining. We have not organized a selling agency in the Illinois territory. (956) I understand that they are not going to organize a selling agency there. I have been so informed.

We have not organized a selling agency in central Pennsylvania. It has been decided not to organize a selling agency in central Pennsylvania.

Recross-examination.

By Mr. O'Brian:

Our counsel, Mr. Liveright, advised us that it would be illegal, but that was not the sole reason for not organizing a selling agency. I think that opinion had some influence. (957)

By Mr. Donovan:

The other reason was that the operators in central Pennsylvania were not favorable at the inception of the idea, because they felt that it did not promise any benefits to that district.

By Judge Parker:

It is true that the tendency in competition between industries is either to cause the industry having the higher cost of production to reduce its cost of production, or else be eliminated from the field. With respect to competition between the coal and gas industry, the situation is this:

Formerly a great deal of our territory was supplied with artificial gas made from coal. That was not a serious competitor, because their costs were such that they [fol. 685] had to have a relatively high selling price. Great quantities of natural gas have been developed in the south and southwest, with the result that those districts have sought markets in the more populous Eastern part of the country. They have built immense pipe lines, and I might add to that explanation that there has been an improvement in the art of laying pipe lines. We are now able to lay pipe lines for various high pressures. The advantage of that is tremendous in moving gas long distances. We compress it into much smaller dimensions, and put it through the pipe line. It is then expanded back. That is not a (958) very good illustration, but I think it covers the point that by putting it under high pressures you move a much larger quantity through the same size pipe. That has enabled them to move these very cheap, tremendous quantities of gas from the new fields into the industrial centers, with the result that they built pipe lines into St. Louis, into Kansas City, and into the Chicago area. From Kentucky and West Virginia, and farther

east, they have built into northern New York State, and we have now natural gas lines in the greater portion of all of this eastern territory.

By Mr. O'Brian:

Yes, I said northern New York. In the first place, there have been new discoveries in northeastern Pennsylvania, in Tioga County, which have been piped over, and the Columbia Gas & Electric Company have recently built lines, I believe, into Albany, or into that territory. I think this is principally Pennsylvania gas, although I believe it is supplemented by West Virginia or Kentucky.

By Judge Parker:

The gas industry is furnishing cities with heat and en- [fol. 686] ergy at a comparable cost to coal. (959) Cost is an item that varies very greatly with different uses and different circumstances. In some places, they can, and in some the coal price is still lower. In household use, there are conveniences that overcome some price consideration, but in the large industrial plants, like the one I cited, the Granite City Steel Company, that was purely a matter of cost. I just recall that the Bethlehem Steel Company in my home town of Johnstown, Pennsylvania, have just recently connected with the natural gas line, within the last two months. They are going to use some natural gas in some departments, in preference to coal.

By Mr. O'Brian:

They cannot use natural gas in all steel departments. They could very closely eliminate coal, but not coke. That is true, so far as I know. I have no knowledge of any iron being smelted by gas. That is not an impossibility however. But it is not being done.

By Judge Parker:

Competition between coal and water produced electric current is real. There is real competition in the whole territories, all the territories, perhaps, but particularly I am closely familiar with Pennsylvania and New York State. In all those territories, the small steam plant has almost entirely disappeared. As a matter of fact, it has

almost disappeared from the coal mines. The majority of coal mines are today buying their power from the central power plants of the big utility companies. I do not know of any substantial power plant in Logan County, for example. All the mines are buying power. In our operations, we have three power plants, but they are all in Illinois.

[fol. 687] With reference to fuel oil, competition has been more intense on the seaboard, because of the ease of transportation to those points. Then it comes in again near the production fields in the southwest. Railroads like the Missouri Pacific, as an example, have changed over a great part of their lines to oil-burners. A great many of the western and southwestern railroads use oil. Some operate entirely on oil, and others partially on oil.

There is a new item of competition in oil that has come very actively to life in the last year or two, and that is the internal combustion engine, the Diesel engine. There are some plants of that type being put in at the coal mines, at the present time, and I have on my desk a proposal to put in quite a large Diesel engine plant. I am prejudiced against it, however. I do not mean to convey the impression that I am very likely to do it, but still it is going in, and I have seen figures on (961) industries that have changed over from coal to Diesel internal combustion engines, in which they show a substantial saving in costs. The reason for the Diesel engine, I think, is probably because it requires less bulk of oil to be transported to produce the same amount of power—I mean in preference to oil burned under a boiler. (962)

For domestic heating purposes oil has made inroads on coal in certain territories, principally in the territories where the price of coal is relatively high—in the New England states, for example. In the Boston area I saw some figures recently which showed an increase in the past year, although I am unable to say whether it was a calendar year or not, of 500 oil burners in the one community. I know many people who have changed over from coal to oil. That has partly been the same as gas—a matter of convenience as well as a matter of price.

[fol. 688] (962) It is my opinion that it is necessary for the coal industry to effect internal economies by organization,

and to engage in extensive advertising in order to compete with those industries. It is my opinion that the advertising that is being done by the coal industry today is almost worthless, because of the meager amount that each individual company can do. Companies in the Chicago district have put their resources together for advertising to combat oil and other fuels. They believe that it is being effective, that it is doing some good. That is one of these intangible things that is hard to measure. I believe that we have a much better chance to meet the inroads of the other fuels if we get together collectively and try to sell the consumer on coal. The oil burner people are doing that very thing. They have organized an institute and they are putting their resources together, trying to press it.

I know about the cost of production in our other (963) mines only in generalities, but in Illinois the business has been generally unprofitable for some years. There is a somewhat different set of circumstances there. We have had a very disturbed condition on account of union labor. In central Pennsylvania it has been more profitable. Generally speaking, I would say that in central Pennsylvania the companies have made a small profit, up until, perhaps, the last year. Some large companies in central Pennsylvania, however, have not made any profit for several years, but I think generally it has been more profitable.

I think northern West Virginia is the worst of the lot. I do not know anybody that has made any money. The largest company in northern West Virginia has been referred to here as being in receivership. That is the Consolidation Coal Company. I think the results in northern West Virginia are worse than anywhere else. I believe that [fol. 689] is a fair statement.

By Judge Soper:

West Virginia Coal and Coke Company is one of the defendants and is located in Logan County, West Virginia. (964) We sell the same kind of coal as the Island Creek Coal Company does. We are the second largest producers from the Island Creek seam. Before 1928 our capital structure was between $20,000,000 and $25,000,000. There were originally issued $10,000,000 of bonds, and that had been reduced by the sinking fund until it was in the neighbor-

hood of $9,000,000. at the time of the receivership. There was preferred and common stock. (965)

I think the Island Creek Coal Company have some advantages that we do not have, and I think the established matter of time, and establishment in the markets, is probably beneficial. I do not like to admit that they mine their coals cheaper, but perhaps they do.

Re-examination.

By Mr. Donovan:

(966) The present capital structure of the West (966) Virginia Coal & Coke Company consists of $1,000,000 of bonds, and an issue of common stock. We boiled that capital structure down *down* about as well as we could. We carry the properties on the books now at approximately $5,000,000.

By Judge Soper:

We paid $1,500,000 for them at the receiver's sale. But there were other receiver's expenses, and $1,000,000. has since been issued for working capital.

[fol. 690] Volume 5 (979) F. A. JORDAN, a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I am the supervisor of purchasing and stores of the Georgia Power Company, Atlanta, Georgia. The Georgia Power Company is a Georgia corporation (980) operating pretty well all over the state, but the principal cities are Atlanta, Macon, Columbus, Augusta, Rome, and a great many other smaller communities. This company furnishes hydro-electric power to retail customers such as for household use and to wholesale customers such as industries. The fuel used in generating our power is principally hydro-electric power—I mean water power—principally located on the stream. We generate our own power and use bitu-

minous coal in limited quantities and also natural gas. These fuels are used in our stand-by plants, that is, a steam plant held in reserve for any emergency. We have one principal stand-by plant and several smaller plants, which are of no consequence. By emergency I mean a failure of any of the plants or a failure of water supply; any emergency that may make it necessary (981) to bring that plant on to the lines. The large plant is equipped to burn both coal and gas interchangeably. The determining factor as to the kind of fuel we will use is the cost. The natural gas has been used in Atlanta about three years.

The coal we use in the course of a year varies from year to year, anywhere from 30,000 to 125,000 tons. At the present rate of consumption we are using not more than 30,000 tons of coal a year. This tonnage was used mostly for the generation of steam for serving the down town business section with steam. The capacity of our stand-by steam plant is about 800 tons per day.

[fol. 691] The producing regions from which we have purchased our (982) coal are Harlan County, Kentucky, and the Alabama fields. There is competition in our territory between natural gas and coal from Alabama and from the Kentucky fields.

By Mr. Donovan:

Q. In event that the producers of coal in the Southern Appalachian region, representing, let us say, 75% of the tonnage produced in that region, entered into a contract with Appalachian Coals, Incorporated, to employ it as their exclusive selling agency for the coal produced by these defendant companies, will you state whether or not, in your opinion, you will be able to purchase coal for your power company in open competition in that market?

A. I believe so.

Q. Why do you say that?

A. I think there would still be plenty of competition, that Appalachian Coals, Incorporated, would have plenty of competition from Alabama, and other operators possibly that are (983) not in this Appalachian Coals organization.

Q. Would the coal that you can obtain from Alabama, or from these independent companies, be suitable for your purposes?

A. It would.

Cross-examination.

By Mr. O'Brian:

The main plant is located just outside Atlanta.

It has a slightly lower freight rate from Alabama. The rate into Atlanta is $1.92, plus 6¢ increase, and the freight rate from Harlan is $2.09, plus 6¢ increase. For the last several years we have bought more Appalachian coal than [fol. 692] Alabama coal. I think that is due to two things, quality of the coal, and the price at which we can get it. With an even delivered price per ton we prefer the Appalachian coal on account of the quality. (984) There is nothing particularly wrong with Alabama coal for our purposes. There is good coal and bad coal from Alabama, but the grade is not so uniform. One mine will furnish coal that is entirely satisfactory and then another mine will furnish coal that is not so good. But there is plenty of good coal mined in Alabama. I don't remember the tonnage of Appalachian coal that we purchased as compared with our purchases of Alabama coal for 1929, because our requirements vary from day to day and from month to month, but our principal requirements for the past three or four years were secured from Harlan County. In the past three years the Alabama coal that we used has been chiefly burned at one or two small gas plants and would not exceed 5,000 tons a year in toto, (985) so that the amount of Alabama coal we burned in the last three years is negligible as compared with our purchases of Appalachian coal. I cannot recall the specific prices of these coals but the prices were always competitive. There is very little difference in price. Since the Alabama coal has a freight differential in its favor of 17¢, we might save a little in the matter of freight, but the difference in the quality of the coal would decide that saving in freight rate.

I think it is a fact that the people in Alabama, because of this differential in freight rate, try to get a little more for their coal at the mines (986) and by the time you give that matter consideration and give the quality of the coal consideration, you cannot see any difference in the price delivered.

[fol. 693] By Mr. O'Brian:

Q. So that, so far as your plant was concerned, in the last three years, on the basis of the coal actually purchased, the Alabama coal was not a serious competitive factor? I mean measured in the amount of coal that you bought?

A. It has not been for the last two or three years, but it is always a serious factor.

Q. Yes, in the sense that it is always available?

A. It is always hanging over the market. In other words, Atlanta is a sort of battleground between the two fields, I mean between the Harlan field and the Alabama field. (987)

In the Atlanta territory proper most of the coal that is sold is Appalachian coal, but in some sections of the state that situation changes. Speaking broadly, there is a very competitive situation in Atlanta. There is active competition between various coals from the Appalachian territory and our business is solicited by different ones of these defendants. We are solicited by all of the principal operating companies in the Appalachian field. (988) By the Appalachian field I mean that we are solicited personally by the southeast Kentucky operators.

In addition to our stand-by plants we use steam for distribution in the down town section of Atlanta, that is, a steam plant is equipped to furnish steam or to generate electricity. That portion of our business is of no consequence. It is in this plant that we are using the 30,000 tons a year we are buying at the present time. We use that coal in preference to natural gas because it would cost money to change over these old plants to a natural gas operation (989). However, one of our plants is equipped to use either coal or gas. It is a new plant built to burn pulverized coal and later additional equipment was added, making it possible to burn natural gas. This particular plant was built with that purpose in mind, but in my opinion it would not pay to use natural gas in our other plants [fol. 694] because we would have to install a changed equipment. Natural gas is now available (990) to the Atlanta plants and at one or two other points, but not generally over the state.

I do not see how the organization of this selling agency plan could affect our buying in any way. I have never in

my personal experience encountered a situation like that in Atlanta where the bulk of the coal coming into Atlanta was controlled as to price by one agency. I am simply giving my best judgment based on other factors. If the price of Appalachian coal rose too much, we would use either natural gas or other coal. This other coal would most likely come from Alabama (991). There would undoubtedly be a good many other mines outside of this organization that would offer coal.

Assuming that the Alabama field were to organize similarly and that the agency had price control of 73% of that coal, it might have some tendency to raise price and affect the ability of the consumer to buy coal at reasonable prices but you still have oil and natural gas. I think it would be a natural thing, if the whole industry were organized, that there would be some raise in price under those circumstances. If the Alabama and Appalachian fields were both organized, there might be some tendency in that direction. (992) I think that the organization of these fields, Appalachian and Alabama, either one of them or both together, would result in a tendency to increase the price somewhat, but the degree to which it would be increased would be affected by the competitive factors that I have mentioned.

Redirect examination.

By Mr. Donovan:

In the past two years there was no competition from Alabama for the contract we entered into with companies in the Appalachian field because we did not give the Alabama operators an opportunity. We knew what we wanted and where we could get it. Prior to that time there was competition from Alabama and that is usually the case, that we [fol. 695] give them the opportunity to bid. In the event that both the Alabama and the Appalachian field were organized and there was no (993) connection between the two, I believe that the operators in Alabama as well as the operators in Kentucky would be just as anxious to sell their coal in competition with one another. In my opinion it would be very hard to organize all of the operators in the Appalachian field. There would still be other operators with available coal.

Assuming that there is a capacity in the Appalachian field outside of the selling agency of 82 million tons a year, I hardly see how there is to be any great increase in price or anything of that kind that could happen except in the event of a war or some emergency. (994)

I do not think there would be any appreciable increase in price because competition is now too keen and would remain so.

Recross examination.

By Mr. O'Brian:

In the event that the Alabama operators, instead of having a sales agency with 73%, had an agency with 90 or 100%, I think the greater the degree of organization possibly the greater tendency toward increase in price. (994)

The greater the degree of organization, I believe, the greater the tendency would be towards fixing higher prices. I would like to go one step further, and say that an organization the size of Appalachian Coals, Inc., would be interested in a reasonable control over prices. I think coal in our field has been too cheap, and these people are trying to get a reasonable price. I do not believe that the Appalachian sales agency would seek to get more than a reasonable price for its coal. I was assuming that in what I have already said. (995)

[fol. 696] If the Alabama field should be tied up by strikes, I believe there would possibly be a tendency for the Appalachian agency to seek to get a better price because of increased demand. As to whether, in the event of another British strike of the magnitude of that of 1926, a concentrated control such as the Appalachian agency would have in its field, of 73%, would tend to a substantial increase in its price, I do not believe it would affect our community like it may affect some others, because of the competition from natural gas and the Alabama coal. (996)

(997) G. V. ALLEN, a witness called on behalf of defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Mt. Vernon, New York, and my office address is 30 East 42nd Street, New York City. I am purchasing agent for the various subsidiaries of the Carbide and Carbon Corporation. Of those subsidiaries the principal users of coal are: the Union Carbide Company; the Carbide & Carbon Chemicals Corporation; the National Carbon Company; the Canadian National Carbon Company, Ltd.; the Electro-Metallurgical Company; the Electro-Metallurgical Company of Canada, Ltd.; the Linde Air Products Company; the Presto-Lite Company, Incorporated; and the Ox-Weld Acetylene Company.

We buy coal in substantial quantities in western Pennsylvania, the Fairmont district of West Virginia, the southern Appalachian district, the Ohio district and Indiana. (998) We also buy about 50,000 tons of anthracite a year, approximately 100,000 tons a year of coke made from bituminous coal and some fuel oil. We also buy in smaller quantities in central Pennsylvania, Illinois, Iowa, Alabama, Missouri, Washington and occasionally we buy some coal in that district in West Virginia between the Appalachian and the Fairmont district and we have bought at times in Maryland. The annual consumption of bituminous coal of [fol. 697] the companies for which I buy is approximately 250,000 tons of coal per annum, approximately 100,000 tons of coke per annum and (999) approximately 40,000 to 50,000 tons a year of petroleum coke.

The bituminous coal that we purchase from these various districts is interchangeable for our purposes. We can use at all our places and in all our different processes coals from several different sources and of different analyses. Low volatile can and does replace high volatile coal. In the past three months at Charleston, West Virginia, which is the heart of the high volatile district, we have saved money by going to the low volatile district farther east and paying 20¢ higher rate to purchase our coal for South Charleston. This coal we have been able to buy at approximately the

same delivered price, and the quality of the low volatile coal, because of its higher heat content, is worth about 20¢ a ton more to us. That is an illustration of the fact that we are not confined to any one district for the purchase of our coal. Another illustration of that is that at Cleveland when (1000) I first started to buy coal for the National Carbon Company the local people said there was only one kind of coal they could use and that was a certain kind of coal coming from the Appalachian territory. That was for use in a gas producer plant. (1001) They said that they had tried other kinds of coal but without much success; that they needed a high volatile coal that would produce gas and would not form a coke and cake up in the machine, and they also wanted a coal that would produce a particularly liquid top.

I asked them if they had ever used Hocking coal and asked them if they would try it which they did. They found it worked better than the Appalachian coal they had been using and the freight rate was 50¢ less and the cost of the coal at the mines was lower.

[fol. 698] Another incident, at Niagara Falls, where we used high volatile coal for lime-burning, one day by mistake the train crew put several cars of low volatile Pocahontas coal up on the trestle which went into the plant. And further, by mistake it was used in place of high volatile coal. When I heard about it, I asked the attendants how the low volatile coal behaved in the kiln, and whether or not they got into any serious trouble, or if the production per pound of lime per pound of coal, had (1002) dropped or increased. They said they could not tell any difference.

There are a number of incidents of that kind. I do not believe there is any place where we have not the choice of several different kinds of coal and other fuels. By other fuels I mean oil principally and in some cases natural gas, although we have not substituted gas for coal in there, nor coal for gas. Our principal coal consuming plants are located in South Charleston, West Virginia; Niagara Falls, N. Y.; Cleveland, Ohio; Sault Ste. Marie, Michigan; Indianapolis; Fremont, Ohio; Fostoria, Ohio.

In Virginia we have purchased a small amount of coal, usually low volatile coal, from the New River or Pocahontas districts. In Georgia we have purchased a very small

amount of coal for heat, from Alabama and (1003) the Appalachian territory. In the Ohio plants we buy coal from Eastern Ohio, from Western Pennsylvania; where there is a 10¢ higher freight rate; from Fairmont, West Virginia, where there is a 25¢ higher freight rate, if the price in Fairmont is 30¢ cheaper than the price in Ohio and the coal is of equal quality. Normally we do not use any coal from southern Appalachian regions in Ohio. In Michigan our coal has come almost entirely from the Appalachian territory in the last few years. It is shipped to the Lakes and taken up the Lakes by boat (1004). There are other coals that are suitable for our uses in Michigan plants. We have purchased and used at both plants coal from western Pennsylvania, Ohio and from the Fairmont district of West Virginia. There is now and always has [fol. 699] been competition on Lake coal from practically all the high volatile producing territory, as well as the low volatile producing territory. In purchasing coal in the Michigan region, we consider western Pennsylvania coal as well as northern West Virginia coal, and all these coals. One of our companies, the Electro-Metallurgical Company, has a captive mine (1005) in the Kanawha district. That mine was purchased because it adjoined a plant site and we expected to use the coal at that plant. However, the plant has not been completed yet and until such time as we have use for that coal at that location we have been selling that coal.

In my opinion there has been active and keen competition in all the markets in which I purchase coal.

By Mr. Donovan:

Q. Assuming that the producers located in this Appalachian region, representing let us assume, 73% of the present production of that region, have subscribed for stock in Appalachian Coals, Incorporated, and have contracted with that agency as the exclusive agency for the selling of their coal, at a price determined by that agency, in your opinion will you be able to buy coal in open competitive markets?

A. It is my opinion that I will be able to do so. I think that we can buy coal at substantially the same prices that we now enjoy, because of the competition that they will

experience from non-members within the district, and because of the competition of other districts.

Q. Well, on the same hypothesis that I have given you (1006) what do you think the probable effect of that organization would be upon direct commercial consumers of coal?

A. Well, I think that an organization of that kind would have a beneficial effect. I believe that a great deal of development and research work should be carried on, and that new uses for coal would be found, and that some of the markets which have been lost to coal to competitive fields, might be regained if there were sufficient interest, if there [fol. 700] were any one big enough and sufficiently interested to carry on that missionary work.

And I believe that some wastes might be eliminated, and that I would expect as the result of the larger production of coal within that territory, and the correspondingly lower prices or costs, because whenever you reduce the production of coal, you automatically increase the cost per ton of what is left. (1007) And an organization of this kind, it seems to me, would have to look forward to larger production. And possibly lower cost. And it would seem to me an impossible thing to raise the price of coal.

I do not think they could raise the price of coal because of the competition, nor do I think it would be a practical or sensible thing to do, because when you raise the price of coal you invite new interests into the coal business. Every time you have had high prices you have had new people come into the business and that creates a larger potential production, and I think that the experience these men have had from short high priced periods in the past would cause them to guard against a recurrence of that situation. Even if they wanted to increase the price I do not think they could.

Cross-examination.

By Mr. O'Brian:

Q. And your answers are based, are they not, on the assumption that they would not increase the price?

A. No, they are based on the fact that they could not increase the price.

Q. And therefore would not increase the price?

A. And that their good judgment would dictate that they would not if they could.

Q. Well, I repeat my question: Your answers then are based on the assumption that they would not increase the price of coal?

A. They are.

Q. Yes. And if it should turn out that they were able to increase the price of coal and did increase the price of coal would you continue to say that their organization would have a beneficial effect upon commercial consumers? Or would that depend on how much they raised the price of coal?

A. Well, I have never considered that they would or could raise the price.

Q. I know, but I am asking you to.

A. Therefore it is hard——

Q. Well, you have given opinions here now. Suppose that the Appalachian selling agency does have the power to increase the price and does increase the price in the mar- [fol. 701] kets where it is selling, would you still say that that would have a beneficial effect upon commercial consumers of coal? Or would you say that that depended on how much they increased the price?

A. I don't know what I would say.

Q. Well, that is all right. You have no opinion based on that assumption then?

A. No.

As a result of the accident I spoke of we have not installed low volatile coal in place of high volatile in our Niagara Falls plant. Coal consumed at that plant comes principally from western Pennsylvania, but we have purchased from northern West Virginia and Ohio and those markets are available. During the years 1929-30-31 we bought (1010) practically no coal for that plant from the West Virginia or Fairmont or Ohio district. In those three years we bought western Pennsylvania coal only. Assuming that western Pennsylvania operators should organize a selling agency similar to Appalachian Coals, and that they should control in the sense that they fixed the price for 73% of the western Pennsylvania coal, I don't think that would have a tendency to increase the price of coal to us at our Niagara Falls plant. I don't think it would have the slightest effect,

because we would still be able to buy coal from the Appalachian group, or rather, the northern West Virginia group or Ohio (1011). There are three districts which at times have been in competition for our Niagara Falls business, namely, Western Pennsylvania, Ohio and northern West Virginia. We also buy some low volatile coal for Niagara Falls but it does not take the place of the high volatile coal which I had in mind.

In Ohio our most important operations are at Cleveland. We also have a plant at Fremont and Fostoria. (1012) For the Cleveland plant we have bought coal from only three districts: eastern Ohio, western Pennsylvania and Fairmont. In the last three years we have used no coal in our Cleveland plant from any other district. In my opinion, if the Ohio coal operators should be organized into a selling agency for a 73% control of the Ohio coal as to price, that would have no effect whatever and no tendency to increase the price at our Cleveland plant.

[fol. 702] We have very small interest in Virginia. At our plants there we buy coal for heating purposes only, and I would say the total amount is about 1,000 tons. In Michigan our principal plant is located at Sault Ste. Marie (1013). That plant will normally burn about 30,000 to 35,000 tons of coal a year. The coal used in that plant is Lake Coal. During the last three years we have purchased it only from the southern Appalachian district, that is, the territory in which these defendants operate. I do not know who the defendants in this case are (1014). I see one company in this list which is a member of this group. We have purchased coal from two others which apparently are not members. During the last three years we bought our high [fol. 703] volatile coal for the Niagara Falls plant only from western Pennsylvania because we consider that we are getting more for our money buying it in that district, price and quality considered. When I spoke of buying our coals in a competitive market I meant that at each of our purchasing points there were certain districts of bituminous coal production that competed for our business (1015).

We buy low volatile coal for use at Niagara Falls for a special purpose in that it is a reducing agent for making metals out of ores. Formerly we used large quantities of charcoal, and we have substituted low volatile coal for char-

coal. We could use, however, and have used, high volatile coal for this same operation. The amount of carbon in the coal determines its value to us and we would have to buy more tons of high volatile coal.

We have about 100 plants east of the Mississippi River. In buying bituminous coal for (1016) each of those plants we virtually restrict ourselves to an average of three or four producing districts. At some of these plants oil and natural gas are available, but in no case have we substituted oil or gas for coal (1017).

HARRY B. MILES, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Columbus, Ohio, and am a retail coal merchant. I am president and general manager of the Reliable Coal and Supply Company. My offices are located (1018) in Columbus, Ohio. I have been in the retail coal business for fourteen years. I sell at retail from 32,000 to 40,000 tons of coal annually, 90% of which comes from the Appalachian district. 10% of that amount is purchased from the Ohio [fol. 704] fields, 70% from the Middle West Coal Company at Cincinnati, 10% from the Smokeless Fuel Company, one of the defendants, and 10% from miscellaneous companies in the Appalachian district. In the fields in which I have purchased coal I have found very active competition in the sale of that coal (1019). Both the producer and retailer of coal are lax in adopting methods to promote the sale of coal. (1020) My experience is that the actual turnover in retail sales is 40% per year due to lack of merchandising and proper sales methods. By that I mean that in any one year the average retail coal dealer will only sell to 60% of the people to whom he sold the previous year. My own turnover for the past several years has been only 11% (1021). I use my own trade names for my own fuel, regardless of where I buy the fuel. The trade name that I specialize on is Ignito, which is a supply name that is copyrighted and protected all over the country. I sell coal from only one

mine under that particular name but I never use the shipper's name. I have syndicated what one might call a service.

In other words, I go into a city and select one retail merchant (1022) and I give him, without cost, the benefit of using that name in that territory under certain conditions. The most important one is that he must supply quality fuel under that name. I do not tell him what fuel to buy but I very carefully analyze the quality of the fuel he is purchasing to sell under that name. The coal that I sell to the consumer under the trade name Ignito comes entirely from one mine, but in some other city one of my dealers may sell a product of a different mine under that trade name. (1023).

In Cleveland Mr. Albright who testified here last Saturday is one of my dealers and he sells a smokeless fuel under that name. I do not care what type of coal is selected for this name as long as it is of good quality. We eventually hope to have a nationwide publicity and national advertis- [fol. 705] ing programs for Ignito dealers. The habits of consumers with regard to the character and kind of coal they purchase (1024) depends entirely upon the ability of the retail coal merchant to put in the proper marketing methods.

I can market quality fuel purchased in Ohio just as easily as I can any other coal, because the personality and methods of the dealer enters into this thing to a large extent. As a matter of fact, it does not make a whole lot of difference about the quality of coal. It depends upon the individual who is marketing the coal. If Appalachian Coals, Inc., becomes an important figure in the sales in the communities where coal is used, it will not hurt my position as a retailer but on the contrary will help it, because the average retail merchant will be more anxious to adopt methods that will help him sell other coals that are competing with coals that are produced by the Appalachian Coals, Inc. (1025) A dealer must adopt every possible opportunity that presents itself in a community. In my community the price of coal does not make a whole lot of difference to me. I use what most producers of coal would classify as a very desirable retail account. I do not know of very many retail accounts that use as much domestic coal from one particular mine as I. That producer is going to be very careful that he does nothing to lose that account, because it is

very valuable. It is hard to get that kind of a dealer. It is necessary for me to increase my sales to constantly put into effect methods that are different than that of my competitor.

In my opinion the organization of Appalachian Coals, Incorporated, would not hurt the retailers one bit. The competition would be such not only from their own district but from competing fields that the (1026) companies that are involved in the defense would be forced to meet the competition of the other fields. There are a number of substitute fuels available in the region in which I operate [fol. 706] and one which is a constant source of worry to the retail distributing agencies in our particular territory, and that is gas. We have in our city perhaps one of the lowest rates in the country. There have been thousands of installations of gas burners and gas can be burned in our city at a figure that is a very slight increase of that at which coal can be burned. Natural gas has been displacing coal very materially and has been the direct cause of a very large number of distributing companies going out of business (1027).

Cross-examination.

By Mr. O'Brian:

Columbus has one of the lowest rates in the country for natural gas so that Columbus is in a somewhat exceptional condition in this respect. Of the 32,000 tons sold by me annually about 85% represents domestic sales to relatively small consumers such as householders, small apartments, garages, etc. and the remaining 15% I sell to large hotels and large consumers of coal (1028). In addition I sell in a jobbing way to large industrial establishments but the bulk of my business is either to the domestic trade or to small industrial concerns. (1029) If proper merchandising methods are used, the price of coal is unimportant. 1030). I maintain that I can market coal regardless of its quality, not entirely by my personality, by the methods I would use in marketing that coal. (1031). That is one of the reasons why I believe that the organization of this Appalachian selling agency would not affect the market. In my opinion, no one can tell whether or not the organization of that selling agency, plus the organization of an

Ohio selling agency with the same degree of control, would have any effect upon the price of coal to me.

(1032) Assuming that the Ohio territory were all [fol. 707] organized into a selling agency such as the Appalachian territory and the Appalachian Coals, Inc., operated in the manner I have heard described, I don't see how these two organizations could have a tendency to increase the price of coal, because we would immediately go to other fields—the non-defendants in this suit as well as the Fairmont district, Illinois district and Pittsburgh No. 8. (1033). Assuming that these two organizations acting separately or acting jointly raise the price of coal 20¢ a ton, I do not think that would have a tendency to increase the price asked by independent operators. I have had a lot of experience with producers all over the country, and they are after business. There is an over-production of coal as we all know. That is in my mind, the chief evil of this industry.

Our market is, perhaps, what is recognized in the coal industry as being the dumping ground of the entire Appalachian district. We have more distress coal poured into our city than perhaps any city in the Middlewest. (1034) It is my opinion that this evil would be corrected by Appalachian Coals, Inc., insofar as the defendants in this case are concerned. If the Ohio coals were organized and the western Pennsylvania coal were organized, and the other great producing districts were all organized into similar agencies, that would have a tendency to reduce the production of coal and to reduce the price of coal. That is because different companies are faced with tremendous charges for demurrage that go along with distress coal that, naturally, if it was not produced, would be reflected in profits for the producing companies. They have oftentimes sold so far below the market value that it is just ridiculous. It is produced practically in that sense, as a by-product of the main coal that the company is selling on orders. (1035) About 90% of my tonnage is bought from one of the defendants in this case.

(1036) Fred K. Prosser called as a witness on behalf of the defendants and being first duly sworn, testified as follows:

[fol. 708] Direct examination.

By Mr. Greever:

I reside in Roanoke, Virginia; my present position is Manager, Coal Department, Norfolk & Western Railway. My duties consist of the supervision of the sales promotion work as done by the Norfolk & Western Railway, for coals produced along its lines.

I entered the service of the Norfolk & Western Railway in the Fall of 1922, as mine rating commissioner. My duties as mine rating commissioner consisted of the rating of the mines for car distribution purposes. While in that capacity, I also served in the capacity of what may be termed a fuel supervisor, in the running of practical tests, and the supervision of the burning of coal on locomotives, and in power plants. In the Fall of 1928, I started the duties leading to my present position. The Coal Department was, in 1928, in its embryo stage. (1037).

Along the Norfolk & Western Railway there are at the present time 23 different seams of coal being mined. With the exception of two of these seams which produce a semi-anthracite coal, this coal is all bituminous and semi-bituminous, varying in volatile content from around 15% to 37%; varying in ash content, fusion point of ash, and in structure of the coal. The Norfolk & Western Railway Co. uses as a fuel in its engines (1038) and in its power plants coal from practically all of these seams. We do not have any special equipment for using these different varieties of coal. It is frequently necessary to make operating adjustments but those adjustments are usually made by the fireman or the engineer. Occasionally it is necessary to make minor changes in equipment. Our specifications for stoker coal call for low volatile coal to be prepared through a 2½" diameter round opening screen, or its equivalent, as against a 2" round opening screen for high volatile coal. With this slight difference we use indiscrimi- [fol. 709] nately both high and low volatile coal although our high volatile coal is confined chiefly to use in our locomotives. (1039) That is due to the fact that, in changing from one coal to another on a locomotive, it is necessary at times, in order to get the best efficiency, to change the exhaust steam orifice. So we try to confine ourselves to one

grade of volatile coal on our road locomotives. To change from one grade of volatile to another grade is not difficult except that you have to put out your fire. To make the change would take two men about an hour and a half or two hours.

(1040) The Norfolk & Western Railway is primarily a coal carrying railroad, about 80% of our tonnage being coal and we are naturally interested in maintaining our tonnage as high as we possibly can. I endeavor to accomplish this by making personal contacts with users of coal in territories where our coal can compete on a parity with coals from other fields. In a number of cases I make those contacts personally. My department of the Norfolk & Western Railway has its headquarters at Roanoke, Virginia. We maintain coal bureaus or branch offices in Chicago, Ill., Detroit, Michigan; Cleveland, Ohio, and Winston-Salem, North Carolina. (1041). We try to cover the territory into which our coal moves, which consists principally of the territory east of the Mississippi River, as far south as St. Louis. We exclude from that territory the various coal field territory for steam purposes, for the reason that we cannot go into the heart of Illinois coal fields and put our coal in there for ordinary steam purposes. I personally visit all these coal bureaus in the various points of that section of the country in the performance of my duties. (1042)

We try to get these consumers interested in our coals. Then we try to get them to make tests of the coal produced along our line. By this I mean tests under actual operating conditions. I assist in the making of those tests in some cases and advise the users of coal as to the kind of coal to use and the way in which to burn them. I also [fol. 710] observe the conditions under which competing coals are used and burned. We make a comparison of the performance of coals from our road as against competing coals. (1043). As a result of my experience, I believe that the coals on the Norfolk & Western are about as high grade as you can find, and generally speaking, coals in the Southern Appalachian territory prove better on a performance basis than coals of different grades from other districts. (1044). From my experience as to the interchangeability of coals from Norfolk & Western territory with competing coal produced in other districts, it is my opinion that as to

steam and domestic coals, which constitute the greatest consumption of coals produced in the United States, coals of a wide variation can be interchanged, generally speaking, (1045) and in a number of cases are in fact interchanged.

Our coal has supplanted coal produced from other districts and vice versa. There is quite a lot of interchanging of coal. The other districts with which our coal is interchanged are Ohio, Indiana, Illinois, Pennsylvania. There has been some interchange of coals with the Alabama field. Practically all coals east of the Mississippi are interchanged. Part of my duties include the work of a practical combustion engineer. I have a B. S. and a C. E. degree from the Virginia Polytechnic Institute.

Cross-examination.

By Mr. O'Brian:

(1046) Ohio coal has a much larger average moisture content than Appalachian coal, which makes it less combustible, and to that extent it is less desirable at the same price than Appalachian coal. Some of the Illinois coal is worse than the Ohio coal and some of it is about the same so that when I speak of these coals from these districts [fol. 711] being interchangeable, that is a broad generalization. (1047)

There are many factors which determine whether one particular specific tonnage of coal is to be interchangeable with another from another district, including the factor of delivered price, but generally speaking those coals can all be interchanged for steam and heating purposes. Lots of times there is a preference. On our road we use almost exclusively high volatile coals on our locomotives (1047).

We consider all coals other than Norfolk & Western coals as competitive and endeavor to demonstrate to consumers the advantages of using Norfolk & Western coals and sometimes to some extent the kind of equipment and size of equipment enters into that question. While it is true that mills which are equipped for one kind of coal may find it less efficient to use a different type (1049) you can often remedy that condition to a large extent by the thickness of your fire bin and the proper control of your draft. I do not say that you can absolutely eliminate all objections but

you can help conditions by that. Modern physical equipment will practically take care of any kind of coal. In our largest power plant we have equipment built prior to 1922 that will burn both high and low volatile coal with practically equal efficiency, assuming that the b. t. u. content and fusion point of ash are the same.

By Judge Soper:

These factors are, of course, important, (1050), and we could not burn a low volatile coal, as an example, with a 10% ash as efficiently as we could burn a high volatile coal with a 2% ash. The quality of the coal always reflects in the b. t. u. content and the higher the b. t. u. content, everything else being equal, the better the coal. (1051)

Even with modern equipment the consumer is interested in the quality of coal which he consumes but he will oftentimes buy a coal of poorer quality at a price. What he is interested in is the cost of producing a thousand pounds of steam. Sometimes he can lower that cost by using a [fol. 712] poorer quality of coal on a cheaper freight rate. It is generally true that with modern equipment you broaden the competitive field.

(1052) By Mr. Greever:

The Norfolk & Western does not pay as high a price for high volatile as they do for low volatile.

By Mr. O'Brian:

It is generally true that smokeless coal is a more expensive coal except at the present time the smokeless slack, the fine coal is cheaper than the high volatile slack due to abnormal conditions. In normal times the low volatile coal, that is the smokeless, is generally consistently a little bit higher. (1053). It is also more desirable and from an efficiency standpoint I would not say that it is more expensive. We do not use more of it on our locomotives because a locomotive is a very inefficient piece of equipment. The size of coal has a whole (1054) lot to do with the efficiency. The reason for the higher price of smokeless coal is because it is generally of higher quality, that is, it has a higher b.t.u. content. It is also generally sized in a greater

variety of sizes than the high volatile coal due to preparation and those sizes may be more desirable. (1055).

Generally speaking, Illinois coal is in all respects interchangeable with Appalachian coal for steam purposes, not ton for ton. I would not say that the poorer grades of Illinois coal are readily interchangeable with Appalachian coal but that coal travels on a lower freight rate very frequently. Speaking of the actual combus-ion of the coal, Ohio coal is, generally speaking, much poorer than the average Appalachian coal. The Pennsylvania coal is more nearly of the Appalachian type, (1056) than any other coal in the east.

In the southeastern territory, Georgia and the Carolinas come in competition with Alabama coal and we also come into competition along the Atlantic coast with fuel oil. American exports of coal vastly outnumber its imports. Illinois coal and Appalachian coal are not interchangeable ton for ton but they are interchangeable for uses, generally speaking. The Norfolk & Western Railway Coals compete with coals from other railroads—coal from the Chesapeake and Ohio, and the Louisville & Nashville. Generally, high [fol. 713] volatile coal is preferred for use in locomotives on account of its coarseness and because it is a little more flashy, that is, it picks up quicker on account of the high volatile content. The low volatile coal, generally speaking, cokes and it is a little difficult sometimes to get the air through the fuel bed. That is a general characteristic for all uses (1058) except in modern power plants with mechanical stokers where you can control that by the feeding of the coal. Most railroads that run thru the smokeless field also run through the high volatile field. The Virginian railroad runs exclusively through the smokeless field (1059) and burns smokeless coal.

Fuel oil for locomotive combustion is practically confined to the territory west of the Mississippi (1060) and is not a competitive factor in railroad fuel east of the Mississippi.

Redirect examination.

By Mr. Greever:

The Norfolk & Western Railway Company is electrified from Bluefield, W. Va., to Iager, W. Va., a distance of about fifty miles (1061). The main line of the road there runs en-

tirely through the smokeless district. The power for that electrification is generated at Bluestone, W. Va. We can use either kind of coal at that plant but at the present time we are confining our use of coal principally to low volatile coal.

Recross-examination.

By Mr. O'Brian:

We use low volatile coal at that plant, not because it is cheaper but because we have contracted for a certain amount of low volatile coal and we prefer to utilize it in power plants for reasons I have before stated. (1062).

[fol. 714] George M. Jones, Jr., a witness called on behalf of defendants, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Donovan:

I live in Ferrysburg, Ohio and am engaged in the production and sale of coal in the State of Ohio, through the George M. Jones Company. That company has several subsidiaries that produce coal, the Ohio Collieries Company in the Hocking District of Southern Ohio, and the Cambria Collieries in the Pittsburgh No. 8 District in Eastern Ohio. (1063) I have been continuously in the coal business since 1920 and have had previous experience.

In the Hocking field our tonnage since 1920 has varied from 500,000 tons a year up to 2,600,000 tons. In Eastern Ohio it has varied from approximately 250,000 tons up to about 923,000 tons annually. The present productive capacity of those mines on an eight hour basis is about 9,000 tons daily. (1064)

Our Hocking coal is an excellent domestic coal. It is also good for railroad fuel and general steam purposes. The most of the lump and egg sizes go into domestic purposes.

The rest of it and some mine-run goes into railroad fuel and general steam purposes. That is, the Cambria Collieries Company the Pittsburgh No. 8 seam. That is an excellent steam coal. Some of the operators there sell that coal for domestic purposes but my company sells it for railroad fuel and general steam purposes. And, of course, we ship to various places. Generally speaking, the coals we have in those mines are interchangeable with coals of the Southern Appalachian region. There is one exception to that and that is in regard to special purpose coal. By that I refer to coking coals and gas producer coals. We do not sell to that business. For some purposes our coals are bet- [fol. 715] ter and for certain other purposes their coals will be a little better than ours.

We sell our coal over a wide field. The most of the State of Ohio, a part of Western New York State around Buffalo (1065) and some coal goes up into Canada. We ship into the most of Michigan, the northern part of Indiana, the northern part of Illinois, largely around the Chicago district. Then, too, some of our coal goes on west into Iowa and Wisconsin for domestic purposes. And of course we ship via the Lakes into the northern ports. (1066).

The nature of my duties makes me familiar with competitive conditions in each of such markets. In respect to each market there is brutal competition between my coal and coal from the southern Appalachian region. In practically every place we sell they are right there trying to get the business away from us. It is also true that where we find their coal we are trying to get the business away from them. In each of such markets in general there is interchangeability between these two coals, with the exception that I have mentioned, where there are certain special purposes. But, of course, that is not the big volume of coal.

By Mr. Donovan:

Q. Assuming that producers located in the southern Appalachian field representing 75 per cent of the present production of that region have subscribed for stock in Appalachian Coals and have agreed to dispose of their product through that agency and at prices determined by it, would that Appalachian Coals, Inc., in your opinion, have the power (1067) to put your company out of business?

A. No, sir, I do not see how they could.

Q. Well, tell us why?

A. Well, we have been competing with them in very severe competition for a great many years, and I do not see [fol. 716] how they could do anything that would make the competition any more severe. And we are increasing our sales now. It looks like we can hold our own pretty well.

Especially in recent years we have been increasing our sales as against Appalachian coal. There has been a reduction in the consumption of coal in practically every market in which my company sells its coal, and that is true about Ohio coal generally. Even though the general demand has been reduced, the Ohio operators and the territory in which they sell have generally either increased their sales there in (1068) spite of the general consumption going off, or they have increased their percentage of the coals sold in those markets, as against the other competitors. For several years there has been a movement in Ohio to encourage the burning of Ohio coal as contrasted with coal produced in other states. There are several of those movements. The State authorities have continuously urged it. There are one or two associations that are urging people to buy Ohio coal. There are tremendous big reserves of coal acreage in Ohio today that are not now open. They lie in all the districts that are now producing coal and, in addition, there are some big reserves in districts that are not active. But several of the districts that are now producing have tremendous big reserve acreages available for competition, (1069) that are ready to be developed at any time. In most cases the railroads pass right by that acreage and in some cases they would have to build switches back in a little ways, but it is all there ready for development.

Cross-examination.

By Mr. O'Brian:

In the last four years there has been a downward trend in the wage scale in Ohio. That is one of the major reasons [fol. 717] why the Ohio producers have been able to increase the sale of their coal. There have been several other reasons. The freight rate and labor costs are very important items. (1070)

My company sold the bulk of its coal in 1929 in Ohio and Michigan. I hesitate to make any guess as to the volume we sold in Michigan in any of these past years because I have not records with me and we sell to several thousand customers scattered around in Ohio and Michigan and different places. Our sales in Michigan have increased in the last three years but I do not have the figures to show to what extent. In selling in Michigan we have a freight advantage over the Appalachian territory of 50¢ a ton. We compete with Appalachian coals in (1071) western New York and Pennsylvania.

There are some Appalachian coals going into Buffalo that are shipped up to some points along the Lakes and then taken over that way. The shipments do not amount to very much but they are a constant threat anyway. There is a very small tonnage of Appalachian coming into western New York, (1072) that is, in the industrial area of Buffalo, Erie County and Niagara. Our companies shipped quite a tonnage of coal in there but I don't remember what the figures were. My company has shipped very little coal into the Chicago market because we are not actively soliciting right now in Chicago. We used to have a sales agency there which sold our coal. We are not selling there but some of the other Ohio operators are selling there.

We have sold the bulk of our coal right in Ohio and Michigan. In these hard times we have concentrated on these two states. Our general office is in Toledo and we are able to handle the business a little bit better from that point. (1073) One of the big troubles with the bituminous coal industry at the present time is over-production. That has been true for some years past. I attended, I think it was a couple of meetings at which was discussed the ques-[fol. 718] tion of organizing the Ohio territory into a sales agency (1074). I did not attend the New York meeting which recommended this regional sales plan. I did attend the New York meeting called about the latter part of October to discuss what could be done to help the coal industry. At that meeting over-production was one of the subjects discussed. Every time coal operators get together they mention that. It is one of the important evils.

We have extremely severe competition from other fuels beside coal. I was not one of those appointed by the Chairman of the New York meeting to be a member of the com-

mittee to recommend and secure, if possible, the adoption of this regional sales agency plan in Ohio. The George M. Jones, President, Ohio Collieries Company, referred to on defendants' Exhibit B is my father. (1077)

Ohio coals are high volatile coals. During the last two or three years our mines have not operated at a profit. (1078)

J. A. Howe, a witness called on behalf of the defendants, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Donovan:

I live in Minneapolis, Minnesota and am Vice President of the Cabin Creek Consolidated Coal Company, the Truax-Trear Coal Company and of the Truax-Trear Lignite Coal Company. The mines of the Cabin Creek Consolidated Coal Company, a defendant in this case, are located at Cabin Creek Junction of the C. & O. Railway in the Kanawha district of West Virginia. The mines of the Truax-Trear Coal Company are located in southern Illinois, in Jackson County, and also in northern Illinois. That company is not one of the defendants in this case. (1079) The [fol. 719] mines of the Truax-Trear Lignite Company are located in North Dakota and in Saskatchewan. That company is not one of the defendants. For the year 1931 the Cabin Creek Consolidated Coal Company had a daily production of 7000 tons, a total for that year of 925,000 tons. The Truax-Trear Coal Company produced about 830,000 tons of southern Illinois coal, and about 375,000 tons of northern Illinois coal. The Lignite Company produced about 625,000 tons of lignite coal in North Dakota and about 260,000 tons in Saskatchewan. The Cabin Creek Company can produce about 7000 tons per day (1080), equivalent to about 2,000,000 tons per year. The Jackson County, southern Illinois mines can produce about 6000 tons a day, or about 1,800,000 per year. It can produce about 3,000 tons per day in northern Illinois, or about 600,000 tons per year. I do not believe we could increase the production of any of these mines without a considerable capital expenditure.

The marketing of coal produced by those three companies is all done under my supervision. Our Cabin Creek coal is sold more or less at tidewater, in Virginia, West Virginia, North Carolina, Kentucky, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Iowa, North and South Dakota. About 40% of our production moves to the Lake front. It is shipped to docks and distributed (1081) along Lake Superior and Lake Michigan for re-sale.

Our southern Illinois coal is sold in the St. Louis market, in Illinois and to a lesser extent in Wisconsin, Minnesota, and Iowa.

Our northern Illinois coal is sold in Indiana, and to a lesser extent in Wisconsin, Minnesota and Iowa.

Our Cabin Creek coal competes at tidewater with low volatile fields. The coals from the Pittsburgh district, the Fairmont district, and central Pennsylvania, with anthra- [fol. 720] cite and also competes with oil. The coal sold in Virginia and North Carolina competes with the low volatile fields. The coal sold in Ohio competes with Ohio and I believe to some extent with western Pennsylvania and with low volatile coals.

Our coals sold in Indiana compete with coal produced in Indiana and with low volatile coals. Our coals sold in Michigan compete with Ohio coals. Our coal sold in Michigan competes with Indiana coals. Our coal sold in Illinois competes with coal produced in Illinois and in western Kentucky, and with low volatile coals, all of the producing coals in the east; with Appalachian coals not much, but with all other producers. (1082)

Our coal sold in Wisconsin competes with low volatile Illinois coals, western Kentucky coals, and Indiana coals. The same situation prevails in Minnesota.

Our coals compete in Iowa against all these producing fields named, and in addition with coal produced in Iowa.

Now, that is referring to the rail markets. Our coal competes off the Duluth market with coals from Illinois, Indiana, western Kentucky, lignite coal, coal produced in Arkansas, and with oil, natural gas and hydro-electric power.

There has been considerable development of hydro-electric power in the Duluth market. The coal docks use hydro-electric power in the operation of the docks instead of coal. Natural gas is also very much in the territory

tributary to the Duluth market. It is coming in at an alarming rate, that is, it is getting nearer to the bigger markets. There is very heavy competition in fuel oil, mostly in the domestic market, so that in the Duluth market coal competes with fuel oil, hydro-electric power and natural gas. That competition has had a depressing effect on coal in the last 5 years. It has affected (1083) the volume of the coal business.

I have had for 21 years actual experience with respect to the marketing of coals in the Duluth-Lake Superior district. I have prepared a statement which will show the [fol. 721] comparative parts played by the various coals going into that district and the competitive conditions in that district.

Whereupon defendants offered in evidence a statement showing the receipts of bituminous coal—docks at Duluth, Superior, Ashland and Washburn. It was received in evidence and marked Defendants' Exhibit 19. (1085)

The table that you have shown me is a statement of the coal receipts at the Duluth, Superior, Ashland coal docks for the last eight years. The figures were obtained from the Maher Coal Bureau. (1084) This report shows coal received at these docks, from various eastern producing fields. It shows the amount and also the percentage from each field. It shows a tonnage from the Appalachian fields of 46.82%. There was a large increase—11%—between the years 1927 and 1928. Between 1927 and 1931 there has been a corresponding increase of 5½% for Pittsburgh coal, and for Ohio coal. These figures are based on the receipts of coal by boat at the Duluth, Superior, Ashland and Washburn docks, that is, within that Lake Superior district contiguous to Duluth.

In the marketing of coal at these docks we have an interest in the retail sale of coal. We are indirectly interested in the operations of the Pilgrim Coal Company, located at Minneapolis. This company operates two yards in Minneapolis. I have prepared a table showing the sales by that company. Whereupon Defendants offered in evidence a table showing sales made by Pilgrim Coal Company. It was received in evidence and marked Defendants' Exhibit 20. (1086) The figures were obtained from the books of the Pilgrim Coal Company. The Appalachian high volatile

coal constitutes 28.55% of the total sales. The next highest coal in percentage was low volatile coal from West Virginia, constituting 26.77%. (1086) A change in the selling price of any of these coals would affect these percentages. The relative prices at which coal is sold have been in existence for so many years that a change in price of any one grade would affect the tonnage sold.

[fol. 722] For instance, in 1928 I sold the Great Northern Railway 100,000 tons of Appalachian coal, in March. In May, 1928, I received a letter from the Great Northern Railway advising me to the effect that it was quite evident that there would be a reduction in freight rate from the Pittsburgh district, and asked me if I could cease the shipments of Appalachian coal on June 18 and change the balance of the order to northern coal. I did that. That is the last Appalachian coal that the Great Northern Railway has ever bough in cargo lots.

The reason for that change was a decrease in freight rates. The differential in (1087) freight rates between the Appalachian coals and Pittsburgh district coals up to and including the year of 1927 was 25¢ a ton. There was considerable litigation during the year of 1928, and it was finally settled with a differential of 35¢ a ton. That is, coming from the Pittsburgh district. But the Ohio district to Lake ports is about 3¢ a ton less. The freight rate on all northern produced coal is lower.

Another example: at South St. Paul there are two large packing companies each using 75,000 tons of coal a year. One of them is using coal from the Ohio district. The other is using coal mostly from the Appalachian district. Although that one is using some coal from the Pittsburgh and Fairmont districts. A change of 5¢ per ton in the price of coal of any of these coals will affect the tonnage purchased. At the present time they are both figuring on natural gas, and it is rumored that one of the companies has tentatively signed an agreement for the use of natural gas.

When I refer to the Duluth market I am referring to the Twin City market. The points to which Duluth coal is shipped (1088). The main markets are within 200 miles of Duluth but some coal goes beyond that distance. As an example of an instance where natural gas has displaced [fol. 723] coal, our company had a contract at Rochester,

Minnesota with the Franklin Heating Co. That is an institution that supplies the heat to the Mayo Clinic and the Hospitals. The contract was cancelled last January and they are now using natural gas.

I have prepared a list of the cities in Minnesota and North Dakota that are now using natural gas or have contracted to use natural gas. Whereupon defendant offered in evidence a table giving a list of the cities in Minnesota and North Dakota that are now using natural gas or have contracted to use natural gas. It was received in evidence and marked Defendants' Exhibit 21. (1088) These figures are based on my own knowledge.

(1089) In regard to the competition with oil in Minnesota, I am not familiar with the outlying districts but there are considerable new installations of oil burners in the Twin Cities area. I have prepared a table showing these figures. Whereupon defendants offered in evidence a paper entitled "Oil Burner Installations, Minneapolis and St. Paul." It was received in evidence and marked Defendants' Exhibit 22. (1089) This table shows the number of installations January 1, 1928, and the new installations for the next four years. This information was obtained from the records of the Fire Departments, Minneapolis and St. Paul. I would say that in every instance the installation of those oil burners has displaced coal as a fuel.

Our coals compete heavily with by-product coke (1090) for domestic and water-gas purposes. I am speaking of the territory tributary to Duluth. I believe we compete in other districts but I am not familiar with the details. The Duluth territory covers an area of at least 200 miles and includes the cities of Minneapolis and St. Paul.

As an example, We were recently competing for the business of the Minneapolis Gas Light Company. Our coal was specified. We competed against not only other coals but by-product coke. There was only a matter of a few cents in their choice between Cabin Creek Coal and by-product coke. They use about 60,000 tons.

Our company is a subscriber to the stock of Appalachian Coals, Incorporated. I look for four major benefits from [fol. 724] the use of Appalachian Coals as a selling agency: first, I expect some reduction in mine operating costs. This will come about by arranging with Appalachian Coals, Inc. Some advance notice as to (1091) loading days. Knowing

the days on which we are going to load coal, we can effect some economies in our operating costs. I can recall many instances where our mines worked without a full day's run, and we would have been glad to have our neighbor load coal for us if we knew there was some arrangement by which he, in turn, would replace that loading.

Second, I look for a considerable saving in selling costs. Some of our coal is marketed at very high cost in some localities. I believe this arrangement will permit us to effect a considerable saving in this direction.

Third, I expect a great benefit from Appalachian Coals, Inc., establishing a department for engineering and sales promotion work. Our company cannot afford, and I do not believe very many companies can afford, to hire really high-grade engineering service. We would get this through an arrangement with Appalachian Coals, Inc.

Fourth, I expect some advantage from not having so much distress coal thrown on the market from our mines. I would like to cite an instance, if I can, as to where I can see the advantages of the Appalachian Coals, Inc. About a year ago, we shipped some coal to the Inland Paper Board Company, who have a plant outside of Providence, Rhode Island. They were using, at the time, coal from central Pennsylvania. They were presented with a proposition from the oil companies, but before deciding to use oil they thought they would try some other coals. They tried coal from Logan County, with some success, with some saving. Then they tried some coal from our mines. We had an engineer on that particular job. We were told after the tests that if we could reduce our price 15 or 20 cents a [fol. 725] ton, (1092) we would perhaps get the business or if we could ship smaller sized coal. By "sized", I mean sized, with some of the duff taken out. We were unable to do it, and the plant is now using oil.

That demonstrates to me that, in addition to having competition with oil and central Pennsylvania coal, first, that if we could effect some economies in our costs, through Appalachian Coals, Inc., it would bring us near to taking business of that kind.

Second, that although that particular business was not attractive to us on account of the price, it might have been attractive to some other operator. I think it takes a com-

pany such as Appalachian Coals, Inc., to function in that manner.

Third, while our company was not able to make a smaller-sized coal, due to its physical conditions at the mine, some other company might have been able to. That is, some other company within Appalachian Coals, Inc., might have been able to make the smaller sized coal. I think it takes an agency such as Appalachian Coals, Inc., to function in that manner.

Fourth, it shows the great importance of being able to have high-grade engineering. As I said before, it is very expensive, and a small company does not have enough duties to employ them. It just cannot afford to do it.

I do not think that the operation of Appalachian Coals, Inc., would tend to eliminate competition in the sale of coal in the markets in which I now sell my coal individually, (1093) for the reason that our Appalachian coal is highly competitive. I cannot see where we would remove any of the competition. The experience of our own company shows that Appalachian coal can be more competitive than any of the other of our produced coals. We figure that on Cabin Creek we have one of the high grade coals of the United States. We are getting 18¢ a ton less realization from Cabin Creek coal than from our Southern Illinois coal, [fol. 726] which is an inferior grade of coal. We are getting 42¢ a ton less than for our Northern Illinois coal, which is not even as good in quality as our Southern Illinois coal. We are getting 32¢ a ton less realization per ton on our Cabin Creek coal than we are on our lignite coal, which contains 38% moisture.

In my opinion the coal produced in the Southern Appalachian region is interchangeable in practically every instance with the coal produced in the other producing districts in the United States. While the coal is interchangeable, it perhaps cannot be interchanged ton for ton, that is it might take more of another kind of coal to bring about the same cost. That is, if you take another coal there might be a ton and a half of it to bring about the same results as a ton of Appalachian (1094). There is a certain price structure for each kind of coal and the difference in the price structure would affect the amount of coal that would be bought. This coal price structure in the markets in

which I have been familiar has been built up for so many years—the difference in price between what is paid for one grade and another—that a change of price in any grade will seriously affect the tonnage of that grade of coal whether the price change was up or down.

Cross-examination.

By Mr. O'Brian:

Q. In your past experience, when this coal price structure has changed, when the price of one or two of the leading coals has risen, has not that sometimes resulted in a rise in the prices of the other coals?

A. Not for that reason.

Q. I am not asking about the reason, but has it not followed?

A. The price of Appalachian coal, or Cabin Creek coal, [fol. 727] (1095) might rise, due to general market conditions, brought about by a greater demand for coal, which would naturally bring up prices in other districts, but not because Cabin Creek coal was raised in price.

Q. Your point is that coal rises in price under ordinary laws of supply and demand, simply by the relation of supply and demand. If there is more demand, it rises, is that correct?

A. That is not history.

Q. Do you think the law of supply and demand does not apply to the coal business?

A. I think it does in this way, that if the price of Appalachian coals should be increased arbitrarily——

By Mr. O'Brian:

Q. I did not mean to assume that it was arbitrary. Is it not a fact that when prices of coal begin to advance, whatever the cause—let us put it that way—there is a tendency on the part of the remaining coals to advance, somewhat?

A. Due to the same reasons.

Q. Due to the extent of competition in the market?

A. Yes.

When I said that we were in active competition with these other coals I meant that we were now in active com-

petition with the 136 defendants in this case. (1095) It is my opinion that to eliminate that price competition, that is to say, for 136 of these defendants to vest in the selling agent the exclusive power to fix the price of their coal, would not in any way affect the price of coal in any market. I am a member of Appalachian Coals, Inc. I think I would [fol. 728] have the same opinion if 100% of the Appalachian coal producers entered into this arrangement. And if the 10 or 11 other agencies that I have heard described were similarly organized with a control of 73%, it is my opinion that that would have no effect on the price of coal. That would also be true if they were organized 100%. (1097).

I look upon competition in two ways: First, as to the matter of price; and second, as to the number of operators that are competing for the business. I think the price in our markets is fixed by the competition in our main markets.

It would only take a few operators in any of our markets to hold the price down. These 10 or 11 large agencies that you refer to there would still be, instead of a battle of the small operators, or there would be, or very apt to be, a battle of giants, so that each one of these selling agencies, if it represented 100%, would really be a giant so far as its own area was concerned.

If one of them had 73% of control instead of 100%, it would still be very big. It would be a fair sized giant. (1098) By that I mean it would be a very powerful factor in the control of production and sale of coal. I do not recall the figures as to the amount of investment that my company made in the preferred stock, or which it will make in the preferred stock, of Appalachian Coals, Incorporated. However, it is apportioned according to our production. It is the same arrangement as with all other producers.

One of the benefits to our own mines of this selling agency would be that there would be less distress coal placed on the market by these producers. When I speak of distress coal I refer to coal that we must necessarily load at our mines in order to take care of business for certain sizes and for which we have no market. This distress coal is practically a (1099) by-product of other coals we make for which we have orders. It is not necessarily small sizes, but it is sometimes referred to as a by-product.

[fol. 729] In regard to the figures given by Mr. Dewberry on distress coal, assuming that he stated that there were a million tons of coal now in various freight yards not yet billed to a consumer, I would not call that distress coal. The practice of shipping coal to a distant siding for subsequent reconsignment is a common practice and has been for years. I mean by distress coal the coal that I am obliged to manufacture as the accompaniment of coal that I am manufacturing and for which I have a purchaser. (1100). The price that we make for our main business is brought about by competitive conditions. We hope, of course, not to have distress coal but we do have it. Sometimes it has to be offered on the market at distress prices, and the consumer gets the benefit of that price.

Our company has had to ship distress coal to the markets and offer it at what might be called a distress price and that coal might come into competition with any kind of coal from any other market. That is a characteristic result for any producer to have some distress coal result from his coal operations. (1101) This matter of distress coal has been going on to my knowledge since 1910 or 1911. At certain times more coal is bought according to particular size than according to mine-run.

Our own company, or I might explain it in this way; That our own company at the present time is making a 9-inch block coal, 9 by 4, and 4 by 2, and 2-inch miners' coal. The making of those sizes, at the present time, is brought (1102) about on account of our having a contract for 9 by 4 coal, and we are long on the 4 by 2 size. We are having difficulty in moving it, and it may be a matter of only the next two or three weeks when we will have to offer the 4 by 2 coal in the market at distress prices. We are carrying our tracks loaded up with 4 by 2 coal at the present time. In this particular instance that is an exceptional contract. (1103)

[fol. 730] Most of the people who order coal from our mines require special sizes. In no instance do we have any coal where the entire output of our mine is sold. We have large contracts in Illinois on mine run coal. But in referring to, again, Cabin Creek coal, there are certain times of the year when the demand for some one size exceeds the demand for the other sizes, causing what I term

in our own particular instance a distress situation. That very often happens in the fall of the year.

Distress coal is usual throughout the year. There is more distress coal in the spring. For instance, when the domestic coal falls off, and you have your steam contracts you have excess domestic sizes to dispose of. (1104) In our mine we have distress coal on hand nearly all the time. We do not have it at all times but we do have it at certain seasons more or less. (1105) We do not have it on hand there most of the time. We have it there all the time. What is being talked of here as distress coal, is really an excess that you have on hand over demand and which from time to time you offer in the market at a special price. We have these sizes created on account of demand for other sizes that we sometimes have to offer in the market. We have an order for, say, two sizes of coal. In getting out those sizes to meet that specific order we make incidentally a couple of other sizes, for which at the moment we have no demand. We hold that as long as we can. When we do not get an order for that coal we ship it out and sell it, but all that amounts to in essence is that we have an excess of coal on hand of a certain size for which we have no immediate market. (1106) That coal is perfectly good coal, of the size that it is.

The word "distress" as I am using it applies to the price at which it is sold. The ability to keep the coal depends in part upon our storage facilities and our sidings. Mines differ in that regard. (1107) Some have more of these facilities than others and the amount of facilities plays a part in the necessity for selling the coal. We store the coal by putting it in cars and holding it until our tracks [fol. 731] are full. When our tracks are full and we cannot hold it any more but have to run it to take care of this other business, it has to be moved. We then send it to market and sometimes at distress prices. We have never used any storage facilities except in the cars at Cabin Creek. Last year we did create space for storage of screenings but it was not necessary to use it. (1108)

Our own tracks at the mine exceed more than a day's output. The railroad charges us for the use of cars and penalizes us for not sending the cars out on the day on which they are loaded. If we hold it too long there is a charge against it. The time limit amounts to a few days.

In the Illinois fields there is a considerable practice of storing coal by making a space available and piling it up. I do not think there is very much of that practice in the Appalachian fields.

When we send these surplus (1109) sizes of coal to the market we sometimes sell them at distress prices, unless we can find a market for them. So that the price of that coal which I call a distress price is the price fixed at destination by the then competitive conditions. We might sell coal at two different prices in the same market on the same day. What is called distress coal is only a fraction of this movement of coal which is called no-bill coal.

I cannot give you any idea of the percentage of our production (1110) in the Cabin Creek field that is sold in that way. It is a perfectly honest practice.

By Mr. O'Brian:

Q. Well then, in speaking of distress coal, Mr. Howe, do you mean only coal that you sold below a price that you think should have been the fair price for that coal in that market?

A. We sell it below the price that we endeavor to get ordinarily.

Q. Yes, you sell it below your normal price, we will put it that way?

A. Yes.

There is no deception about it. And whether one operator thinks his coal is distress coal or another operator thinks that it is not distress coal is a question of the operator's opinion as to whether he is getting a normal price for his coal. But the price of that coal like the price of the (1111) coal sold on ordinary order is always determined [fol. 732] by the conditions in the competitive market at the time it is offered. (1112)

It is possible that some operators may have distress coal in one size of coal and another operator on a different size of coal. That situation is more apt to arise during a quick drop-off of business or a quick pick-up of business of some certain sizes. In the Fall, there is a quick pick-up of domestic sizes which creates an excess of steam sizes. The opposite happens in the Spring, because of the cessation of the use of domestic sizes.

By Judge Parker:

When I say that distress coal is coal that is sold for less than what I think is the market price I do not believe that there is any difference between that definition of distress coal and the definition given by other witnesses to the effect that distress coal is coal that is sacrificed because it has been loaded and is on demurrage. (1113). I am referring to distress coal as being coal of which we have an excess and which we have to sell at sacrifice prices. We have to sell at sacrifice prices because we have no market for it at the price we are endeavoring to get. That coal is not necessarily coal that has been loaded and is on demurrage. Very little of our coal gets on demurrage but when it reaches that stage and before it reaches that stage, we dispose of it which I think is good business. In our own particular instance, we bill very little coal out without an order for it. (1114).

I believe the trade understands that distress coal is coal that has been forced on the market by an operator who has not enough business for that particular size and it must be offered at a sacrifice. Coal that has been shipped out on demurrage is also distress coal. The fact that we ship very little coal without an order does not mean that we ship very little distress coal.

By Judge Soper:

We have some capacity at our mines for a day's run and [fol. 733] when our mines become blocked with coal and we cannot hold any more coal at our mines, it then becomes necessary to offer some of that coal at distress prices. By distress prices I mean prices less than the prices we are endeavoring to get for that size of coal. For instance, if we are selling coal at $2.50 per ton and we have some coal that we want to get rid of (1115) I would not say that $2.40 would be distress coal because I do not believe in many instances there would be enough inducement to the buyer to take that coal with only 10¢ differential at that high price level.

At the present time we are trying to sell our Cabin Creek egg coal at $1.35 a ton. Distress coal would be coal sold

from 10¢ to 25¢ a ton less than that figure, depending on how much we can get for the coal.

By Judge Parker:

We do not call coal that we have mined and have not an order for distress coal until it becomes necessary to actually move the coal at the distress points at sacrifice prices.

By Mr. O'Brian:

Production of this distress coal is the normal result of producing any coal. (1116). In the spring of the year when the demand for domestic coal falls off there is at that time excess coal of this sort. That would be so whether Appalachian Coals, Inc. were incorporated or not; there would still be this excess of sizes for which there was no demand but I believe an agency having a large tonnage could help one operator and another. All operators do not have this excess tonnage at one and the same time.

Every operator who makes one grade of coal, has the other grades as the necessary and normal incident to that making of the one grade. Now, that is what I will call for the moment excess coal. When that has to be moved to market, actually has to be moved now, and has to be sold under competitive conditions in the market, that if that excess coal is sold below the normal price, the operator calls it distress coal.

[fol. 734] If Appalachian Coals, Incorporated, were organized each operator within that agency would not have extra sizes at the same time. It is true that in the Fall and the Spring of the year, the agency would be more bothered. When I say I expect some benefits in connection with this distress coal, I do not expect a 100% cure. But I do expect (1117) considerable help. The agency being of a large order, it will have on hand any day and every day a large number of orders for block and egg coal. And they would place them at the mines and I would expect them to place orders at our mines in proportion to the sizes we make, as nearly as they can. They would still have some trouble in the Spring or in the Fall when there are these conditions resulting in an excess of sizes of coal not on order. The selling agency itself might have to offer

that coal at what I would call a sacrifice price. I think it would have to do that but I think that there would be less of that kind of coal offered.

By Judge Soper:

We have distress coal during times when the market is good for coal and when there is a good demand for coal but not to as large an extent. Some buyers in a market of this kind insist upon a certain size of coal and in a fast market they are willing to take a different size of coal, thus giving great flexibility to the mines. (1118).

By Mr. O'Brian:

The Cabin Creek Coal Company marketed in Michigan in 1929 73,856 tons, in 1930 58,000 tons and in 1931 59,700 tons. We did not send any Illinois coal into Michigan in those years, nor did we send any Illinois coal into Ohio in those years. Some of our Cabin Creek Coal was marketed in Lake shipments, some went into Michigan and some went into Ohio. In 1929 we shipped into Ohio (1119) 137,368 tons. 695,436 tons went up to the Lakes in 1929. That was the largest percentage of our Cabin Creek coal. The Lake shippers are ordinarily the larger operators in the [fol. 735] Appalachian territory. We come into competition with central Pennsylvania off the Duluth-Superior coal docks. In that illustration I gave, as to the Inland Paper Company, they were using coal from the central Pennsylvania district previous to our running the tests. They are not large shippers of central Pennsylvania territory, into the Lake territory, the Duluth territory.

Referring to defendants' Exhibit 19, I would say that conditions in 1930-31 and 1931-32 were increasingly abnormal owing to the general paralysis of industry (1120). This table shows that the shipments of the Appalachian territory into the Duluth district were 39.50% in 1924 and that in 1929 the percentage is 43.06% which would make it something under a 4% shrinkage. I take it that in 1924 there was less coal shipped to that market than in 1929. The freight rate plays some part in our competition the same as it does with the ordinary coal operator. It is a very large factor, and labor conditions affect it also. Referring to the exhibit I prepared showing the extent of oil

burner installation in the Twin Cities area, the population of that area (1121) is about 900,000.

MILTON E. ROBINSON, JR., was called as a witness on behalf of defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Chicago, Illinois and am a coal retailer. I am Vice President of the Milton E. Robinson Coal Company which does business on the south side of the city of Chicago. I have personally been in the retail coal business since 1914 but the business dates from 1888. (1122) Our firm is a member of the National Retail Coal Merchants Association. That is an association primarily made up of what might be termed a federation of local associations of retail coal merchants, some city-wide, some State, and one [fol. 736] or two inter-state associations; and we have a little in excess of 100 such associations, with a membership in excess of 5,000 scattered over 42 states and the District of Columbia.

I was First Vice-President of the Association for two years and its President for four years from 1928 to May of this year. As President of this Association I travelled something in excess of 70,000 miles during the four years that I was President and visited a great many local associations. I met quite a number of retailers throughout the country in different sections. I am familiar with the business of retailing coal. (1123)

It would be my opinion that an agency like Appalachian Coals, Inc., or any similar agency, would act as a sort of fly-wheel. It would possibly tend to carry on the momentum when power tended to go off, and would restrain the momentum when power came on rapidly. By that I mean this: If the demand for coal should fall off, an agency like Appalachian Coals, Inc., should be able to exercise some regulatory power, and cut the cloth to suit the necessities of the situation. I think if demand should become excessive, as it has a few times within my recollection, an agency

such as Appalachian Coals, Inc., should be able to restrain the individual operators from a run-away market situation, such as I have had experience with.

Cross-examination.

By Mr. O'Brian:

(1124) As I understand it, Appalachian Coals, Inc., is to have the power to place the price of coal mined by its members, so that the member no longer has anything to say about the price he will charge. It seems to me that under a situation like that the group judgment would be better than individual judgment.

The price which would be fixed by the agency would be the result of the group judgment. I believe that the selling [fol. 737] agency would be content with a lower price than some of the operators would be, and that the operator would be restrained to that extent from getting the price that he thought he could get for coal. When you reach a run-away market, nobody pays much attention to what the other fellow is doing. He gets all he can, and due to the fact that the majority of time in the coal business nobody gets a very high price, and there is evidence in this case that a great deal of the time a great many people are operating at a loss. (1125) There is a great incentive, then, when you can get all you can to get as much as you can. I have stated that I believe that the selling agency would act as a fly-wheel and restrain momentum at a time when the demand fell off.

If you were to take a table—I have never seen one, but, if one could be compiled showing the price at which every car or ton of coal was sold by these defendants over a period of time, the lower price brackets in that table would represent distress coal, the coal that was sold at the buyer's price, for whatever reason.

Now, if, as the proponents of the plan seem to believe, they can ameliorate the condition in that type of coal, then you will remove those prices from your tabulation. (1126) I do not know how the performance of this plan is expected to ameliorate that condition, but I see one way in which it can be done. In my opinion, if operator A has one kind of resultant, and Operator B has another kind, and Operator C

has a third kind—and there may be five or six—there are many different sizes of coal. Under present conditions, these gentlemen have got access to one another's stock of coal which must be moved at the buyer's price, but under such a set-up as Appalachian Coals, Inc., there would be, in effect, a pool, although the pool would be distributed among the different mines, receiving points, and what-not, but they would have, in one central location, a record of [fol. 738] what was available, and it would seem that under those circumstances it would be possible to market that coal at a slightly better price than it is marketed when it is a case of each man for himself, and they are not in touch with one another's excess. In other words, a higher price would be realized for this excess coal marketed through the selling agent, than if the members of the agency were each trying to sell it on his own hook, in competition with one another (1127).

By Judge Soper:

If there is a falling of the demand, there is no necessity for mining coal, except as there is a demand for it, and a group of this kind, in touch with such a large production, should be able to issue instructions to their stockholders to permit them to discontinue production, more readily than that information, perhaps, could reach the same number of individuals without a similar cooperative plan (1128).

Landon C. Bell was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Columbus, Ohio. The name and location of the coal producing companies which I represent are the Red Jacket Consolidated Coal and Coke Company, Incorporated, and the Red Jacket Junior Coal Company. These companies are affiliated. Both are operating on contiguous properties in Mingo County, West Virginia, which is a

tributary to the Norfolk & Western Railroad by a little branch line reaching the main line of the Norfolk & Western at Matewan, near Williamson, West Virginia.

The Red Jacket Consolidated Coal and Coke Company, [fol. 739] Incorporated, has preferred stock of $715,800, and common stock of $2,386,000. A total of both stocks of $3,101,800. It also has outstanding a bonded indebtedness at the present time of $530,000 principal indebtedness. (1129) Some interest due. And it also has due obligations for borrowed money of $804,315.58. All of those items I have mentioned totalling $4,436,115.58.

The Red Jacket Junior Coal Company has a common stock of $150,000. No preferred stock. It has no bonded indebtedness, but it has obligations for borrowed money past due of $192,500. Or a total of $342,500. The amounts I have mentioned combined for both companies are $4,778,615.58.

The present owner of the stock of those two companies, the W. M. Ritter Lumber Company, acquired the stocks of those companies in 1923, and paid for the stock of the Consolidated company $832,085; for the stock of the Junior Company, $337,500. Or a total of $1,169,585.

And since that time—since the acquisition in 1923 and the present time—it has lent to the Consolidated Company $804,315.58, and to the Junior Company $192,500, or an aggregate of $996,815.58.

The aggregate amount invested in the stock plus the loans which it has made make the aggregate amount invested $2,165,400.58.

These companies have not made any profit since 1923. Not even in 1926 (1130), the year of the British strike. The recoverable tonnage from the properties of the Red Jacket Consolidated Coal and Coke Company is approximately 20,000,000 tons. From the properties of the Junior Company 25,000,000 tons (1131).

In 1923 the two companies together mined 585,200 tons.

In 1924	874,200	tons
In 1925	1,169,865	"
In 1926	1,359,100	"
In 1927	1,149,489	"
[fol. 740] In 1928	1,018,227	"
In 1929	1,855,063	"
In 1930	1,710,663	"
In 1931	1,498,860	"

And for the six months of 1932, 335,024 tons.

I am familiar with the cost of production and realization per ton in these mines since 1923. In 1923 the cost of production for the two companies was $2.367 per ton. The realization was $2.230 per ton.

In 1924 the cost of production was $1.691. The realization was $1.475 (1132).

In 1925 the cost of production was $1.536. The realization, $1.416.

In 1926 the cost of production was $1.583. The realization was $1.553.

In 1927 the cost of production per ton was $1.692. The realization per ton was $1.514.

In 1928 the cost of production was $1.60. The realization was $1.368.

In 1929 the cost of production was $1.319. The realization was $1.208.

In 1930 the cost of production was $1.366. The realization was $1.116.

In 1931 the cost of production was $1.180. The realization was $0.904.

For the first six months of 1932 the cost of production was $1.584. And the realization was $0.898.

In estimating cost our companies consider all of the factors that proper accounting methods and the regulations of the government in computing income tax returns are required to be taken into consideration. (1133) They are labor and supplies, royalties, interest, insurance, taxes, [fol. 741] salaries, depreciation, depletion, compensation commission charges, and power. I have a complete detail of it, which takes a great deal more space. But that is it. I do not know the average cost and the average realization per ton in these mines since 1923. I have given the cost year by year and the realization by year, and I have the total amount of loss as well as the amount annually.

The loss since 1923 has been $2,171,359.23. I have some figures here to show the demurrage charges paid by the company for each year since 1924.

For eight months of 1924 the demurrage charges were $1,763.01 (1134).

In 1925 the demurrage charges paid were $2,364.12

In 1926 it was $ 2,241.56.

In 1927 it was 3,887.77.
In 1928 it was 8,175.41.
In 1929 it was 6,331.59.
In 1930 it was 30,325.07.

And for 1931 I only have the figures up to the end of September, and that figure was $22,181.40. So that last year we were about $20,000 more for nine months than we were for the whole of 1926.

Our properties are located in the Williamson field. I am reasonably familiar with other properties in that field. I am not an operating coal man but I have lived in the region there, and I am an executive of the company as well as of the W. M. Ritter Lumber Company, and I have a fair familiarity with it (1135).

I have only a general knowledge as to whether or not the picture I have given here of the financial situation and the loss in the case of my own company would compare with other properties in that field. I have an opinion as to that. We have one of the best properties in that field. By that I mean that it is good coal. We have reasonably good oper- [fol. 742] ating conditions. We have, I am sure, a production cost that compares favorably with our neighbors and competitors and our coal is well sold in the competitive market.

Cross-examination.

By Mr. O'Brian:

I have our annual statement here and would be glad to give you any of the items showing our charges for depletion and amortization. (1136) The statement shows that at December 31 our charge-off was 21¢ for depreciation and depletion. I might say that a part of the coal lands that the Consolidated have are owned in fee and a part are leased. All the lands of the Junior company are leased. The depletion rate for the Consolidated Company for its fee lands is .349 per net ton. And that is divided into cost of the property .01557, and depreciation .1933, that being the amount at which the value of the property was established as of March 1, 1913. That makes the difference between the cost and the depreciation items.

I only gave the rate of depletion for the fee property. That picture would be incomplete without adding the figure

as to the leased lands. That figure is .015 per net ton. And the rate of depletion for the Red Jacket Junior Company, all of which property is leased, is .02899 per net ton. And the average for both fee and leased lands for both companies is .0270 per net ton. (1137) I attribute the loss which we show over a period of years in part to over-production in the coal industry. But I would not attribute the major portion of the loss to that.

I would say that in my opinion the largest single factor is the fact that these coals are mined in a region that is not industrialized, and there is very little local consumption, and a very large part of the production, the great bulk of [fol. 743] it, and probably I think some one has testified what it is, but say *ra*ound 75 or 80 per cent of the coal is sold in the highly competitive region east of the Mississippi and north of the Ohio, where this coal has to take a freight handicap of from 35 to 50 and more cents per ton, and it is competing with coal of a fairly valuable quality, coal that can be mined at approximately the same cost, and its competitors can sell their coal at something above cost of production, and in order for us, and similarly situated operators to compete, that is, to sell coal and keep our mines running, we have to sell it at less than cost of production. (1138) That situation has been getting progressively worse through the years, and as the result of the widening of the State differentials, I believe that is the largest single factor.

I was at the October meeting in New York. I was not at the December meeting that has been referred to here. I did not know that there was a "Bell Plan" to cut down or regulate over-production. I heard this plan described here as emanating from Mr. Steinbugler. I think that a good many years ago Mr. Greever and some others of us discussed a plan similiar to this, for the lumber industry. I am familiar with the paper you have shown me but I should not have the honor of being regarded as the author of that by any means. I simply suggested it to this meeting. It had been suggested before, on numerous occasions by other people. (1138) At the October meeting in New York the question of the difficulties in the industry was discussed and one of the difficulties there suggested was over-production.

At that meeting I suggested a plan for the creation of a tribunal of government officials and the plan contemplated their making findings, and under proper circumstances arranging to curtail production of coal. But I would like to add this:

My recollection is that the Chamber of Commerce of the United States had been considering that matter, and had [fol. 744] made a study of it, and had made certain recommendations, with certain conclusions, and what you have shown me in the document which I have just read, was a suggested substitute for the conclusion of that report. I suggested that change, which was slight. In other words, the remedy I was suggesting to this New York meeting was a remedy aimed to cut down the production of coal through some sort of tribunal which should investigate the matter. I was at the New York meeting and had a most inconspicuous part in it. After a great deal of discussion and (1140) suggestion, many suggestions being made at the suggestion of the chairman—the meeting was just sort of a mass meeting to discuss the condition of the industry, and anybody interested in it to endeavor to suggest something that might possibly help the situation, and that was my small contribution to it.

By Judge Soper:

The purchasers of this coal property were willing to give something over $1,000,000 for mines that could not be operated except below the cost of production because they were hopeful that there would be an improvement in the condition of the coal industry. They could not foresee what was going to happen in general conditions, and especially with regard to the rate situation. I am very certain that if they had remotely dreamed that the differentials against the Southern fields would be widened, as (1141) they were subsequently widened, they would not have made the investment.

By Mr. O'Brian:

So that a serious factor in this situation is the freight rate which has been imposed or approved by the Interstate Commerce Commission. In our personal situation I think it is somewhat disastrous. I do not know that the selling

agency will help the freight rate situation, but I said I thought possibly that was one of the large things. There are others which have been mentioned here, which are serious, such as over-production. There is this matter of [fol. 745] distress coal. I hesitate to use that term, although it is one commonly used in the industry, and there are various other factors (1142).

In regard to distress coal, when you are mining coal, you bring it out of the mine in the condition in which it has been shot down. Some of it is fine coal, some is lump, and so forth, such as has been described here, and that is separated by a process of passing it (1143) over the tipples. We will have a lot of selling agents soliciting business in various consuming territories over the country. One salesman will not know what his fellow salesman somewhere else is booking orders for. We may have, and do ordinarily have, contracts in effect for a year for certain sizes and kinds of coal. They are valuable contracts, and if you break them, you are in for damages for not fulfilling your contract. But it is impossible to mine out of the mine the coal to exactly fit what you have contracts for, or may secure orders for. The coal that you produce of that kind, is the coal that is not spoken of as distress coal. The resultant coal, that comes in producing what you do get orders for, or have contracts for, is coal that you must find a place to sell, because you cannot sell coal in these mountain sections, to any extent at all, because of the topography of the country. You cannot pile it and leave it, as you can do in the case of lumber, because it will disintegrate and deteriorate, and the re-handling cost would be very great. So, the result is that when you have produced a certain amount of coal out of your mine, to fill orders that you have, you have what has been described here by some witnesses as a resultant coal, or a coal for which you have no orders.

Now, in a very little while, if the market for those grades for which you do not secure orders, is inactive, you find that your orders for coal are out of balance, to use the language of the industry. You are getting coal of a certain amount to fill your orders, and you are accumulating a surplus of coal that you find it difficult to sell (1144).

[fol. 746] That is in cars. All of it is in cars. That coal very soon goes to these tracks and concentration yards,

and goes upon demurrage. Demurrage coal is certainly distress coal, because if it remains unsold and on demurrage a very little while, it will soon eat up its entire cost. My understanding of distress coal is that distress coal is not confined to coal that is on demurrage, but such surplus production for which you have no orders, that is not under contract for delivery, and which you have on hand, and which you must find a place to sell, and therefore accept whatever price you can get, almost, regardless of whether it is above or below the cost of production, because if it is on demurrage, I say that is distress coal. If it is about to enter the state where it will go upon demurrage if you have no order for it, it is equally distress coal, in my judgment.

By Judge Parker:

If we made some of these extra sizes that we did not have orders for today and loaded them in cars and had them on the siding, and obtained an order for that grade of coal tomorrow, of course, that would not be distress coal.

It is also clear that it would be distress coal if we shipped it to a distrubution point and the cars were on demurrage (1145).

The line between the two comes when you have your tracks at your yards filled up, so that you cannot produce any more coal from your mine, and set it out on the sidetracks for the railroad to take away, even to fill the orders which you have in existence.

There are a certain number of cars per day allocated to the mines according to the mine rating; there are a certain number of cars the mine is entitled to. I am unfamiliar with just exactly how that matter of handling those cars is handled, how the allotment is handled, whether they take the cars there, whether they are ordered out or not, and so forth, and that is one of the reasons why, recognizing my limitations in not being a practical operator, I desired that [fol. 747] someone more familiar with this phase of it explain it to the court (1146).

By Judge Soper:

To some extent this condition has existed ever since I have been in the business. It is a usual incident to the production of coal, being exaggerated or accentuated by con-

ditions from time to time. It is not a regular uniform condition that obtains, but it happens sufficiently to constitute a factor that the coal producer has got to reckon with in fixing his prices. If the market would permit it the producer would if he could, fix the price of coal for which he has orders at sufficiently high a point to cover such incidental losses as he might suffer on the grades on which he would not have immediate orders, if the competitive situation was such that he could get orders.

Q. Well, why wouldn't it? It affects everybody doesn't it? It affects you and it affects every other coal producer doesn't it?

A. To some extent I am sure it does, yes.

Q. What I am getting at is: Why isn't it one of the factors which enters into the competitive price of coal? Every coal producer suffers these losses from time to time. Just as if, for instance, you were engaged in a railroad business, you would have to count on so many damage suits every year and so many losses of that sort. It is one of the cost of business. Now isn't this the same thing? If it is the customary practice I do not see how it can help but enter into the cost from year to year of coal.

A. I guess your Honor is right about that.

But it is also an incident of the reaction on the coal market.

By Mr. Donovan:

I have no doubt that it could be minimized by an increase of tonnage in a given territory, because one man may have distress coal that is lump, another man may have distress coal that is slack, another man may have distress coal that is different grades. One mining company I mean.

But there being no interchange between the companies as that matter, why each man has to handle his own situation, and that was one of the benefits that was expected to accrue from the ability of a selling agent like Appalachian Coals, Inc., to know these facts and to handle these different grades and kinds of coal, by a knowledge of conditions be able to balance orders. (1148) I do not think there is any practical method by which this thing could be [fol. 748] handled in some kind of an exchange in such a

fashion that no one could take exception to it. I think that the concensus of opinion of the gentlemen who organized Appalachian Coals, Inc., thought that this was an approach to the matter that would be as little open to objection as any possible plan could be for that purpose.

[fol. 749] COLLOQUY BETWEEN COURT AND COUNSEL

By Mr. O'Brian: In regard to the plan which I proposed at the New York meeting (1149)—in a moment of, or in a condition of desperation, you might say, I was willing to go so far as to submit to, in a degree, to a sort of Federal regulation of the situation, as much opposed as I am to government in business. I don't think it was as good a plan as this plan. In fact, this plan I had something to do with formulating before that suggestion was made.

I am certain that the question of distress coal was mentioned at that meeting. I do not recall who brought it up. I am not absolutely sure about that. I do not know whether there were any minutes of that meeting kept or I have never seen any if there were, and we were there all day and the gentlemen talked about everything. I think that was discussed.

By Judge Soper: I heard Mr. Francis' testimony on this subject when he stated that he would not accept orders for his company (1150) which would result in the production of a whole lot of coal that he did not have orders for.

I do not know the peculiarities of Mr. Francis' situation. And I know that most operators find it utterly impossible to keep their contracts filled and their current orders filled without the production of coal which becomes distress coal. Because they are unable to sell the same proportion—they are unable to make sales of different grades in the same proportion that those grades are produced from the coal as it comes from the mine.

By Judge Parker: It is not customary for coal operators to mine coal for which they do not have orders (1151) except as incidental to the mining of coal for which they do have orders. We only get it out as we have the orders for it, and as an incidental by-product, so to speak, in the produc-
[fol. 750] tion of coal that you must deliver. Out of that in-

cidental by-product sometimes comes this so-called distress coal, and that is when it has to be sold at a low price that portion of it is called distress coal. That is quite a substantial portion and occurs not merely sometimes, but very often (1152).

HOWARD N. EAVENSON, a witness called on behalf of the defendants, having been heretofore duly sworn, testified as follows:

Direct examination (resumed).

By Mr. Donovan:

I am a mining engineer, connected with the firm of Eavenson, Alfred & Hicks, of Philadelphia. I am also connected with the coal business. Our engineering work is exclusively connected with the coal industry. I am President of the Clover Splint Coal Company, operating in Harlan County, Kentucky; President of the Comago Smokeless Fuel Company, which has two properties in the Smokeless field of West Virginia, which it has sub-leased, and we are not operating. I am vice-president and director of the Boone County Coal Corporation, of Logan County, West Virginia. And I am a director in the Pittsburgh Coal Company of Pittsburgh, Pennsylvania. I have been practicing my profession since 1892, a period of about forty years (1153).

I was educated in the public and Friends Central Schools in Philadelphia. I graduated at Swarthmore College in 1892. I had the degree of Bachelor of Science. In the next two years, I spent in Wise County, Virginia, with the Virginia Iron, Coal & Coke Company, which had a large property there, and was leasing a number of those properties. While there, I was connected in the office and in survey work outside, and was resident engineer on the first 100 coke ovens that were built in that part of Wise County.

[fol. 751] I spent the next two months with the Ship Canal survey, between Philadelphia and New York. And at two times within the next year and a half was recorder on the re-survey of the Great Lakes, on the United States Engineer Corps at Sault Ste. Marie, Michigan, on survey work.

In 1895, I went to Scotdale, Pennsylvania, in the heart of the Connellsville coke region, as draftsman with the H. C.

Frick Coke Company. I stayed with them until 1900 as draftsman, and division engineer in charge of their northern division.

In 1900 I went with the Pittsburgh Coal Company for four months, as division engineer, with the idea of developing some of their coking coal properties.

In the middle of that year, I went to Uniontown, Pennsylvania, as chief engineer of the Continental Coke Company, which (1154) was the fuel subsidiary of the National Steel Company. It was later merged with the Carnegie Steel Company. They were building two plants when I went there with them, and I completed those, and designed and built a third plant at Uniontown, Pennsylvania.

When the United States Steel Corporation was formed in 1901, they took over the Continental Coke Company, and I became assistant chief engineer in charge of construction work for the Frick Coke Company.

In the late fall of 1901, the United States Steel Corporation, through the Illinois Steel Company, leased a large tract of land in McDowell County, West Virginia, and with a contract to build 3,000 beehive coke ovens in three years, and to develop the property to be capable of manufacturing 1,500,000 tons of beehive coke a year.

In October of 1902, I was sent to McDowell County, West Virginia, to take charge of that property as chief engineer. When I reached there, there were three plants under construction. We completed those, and at intervals between 1902 and 1907, designed and built nine other plants.

[fol. 752] I was chief engineer all of that time. Those properties were developed to a capacity of 6,000,000 tons a year. During that time, at various intervals, we were offered tracts of land all over Southern West Virginia, Virginia and Kentucky, and we examined and made reports on a very great many of them.

In 1916, we began to search for a very high grade high volatile supply of coal in that territory for their Western (1155) plants.

In the Spring of 1917, the company purchased, on our report, 17,000 acres of land in Harlan County, Kentucky, and in August of that year at the request of the Government, in order to get a supply of toluol and benzol for explosives,

we began the construction of a plant at Lynch, Harlan County, Kentucky, which was pushed as rapidly as it was possible to do so.

And before I left the United States Coal & Coke Company in 1900, that plant had a capacity of 2½ million tons a year, and I think it was then and is now the largest single plant in the entire Appalachian region.

About the same time, we had made a report on another property in Mingo County, West Virginia. And that was purchased in the Fall of the year, but has been kept in reserve for the future, but also with a view of using that coal in the Western mills.

In July of 1920, I left the United States Coal & Coke Company, and opened an office for myself in Pittsburgh. Since that time, I have practiced in almost every coal-producing state in the United States, and in Mexico, Canada, Germany, and have designed a number of plants, and have made reports on a great many properties throughout the country.

Lately, my business has turned more from construction to something on the order of management engineering. That is, considering the future possibilities of plants with regard to markets, and ability to mine coal cheaply, and matters [fol. 753] of that sort. And I have had a great deal of that kind of work to do within the last two or three years. (1156) In 1927, we secured a lease on the property in Harlan County, and developed and built that plant since that time.

I have belonged to the American Society of Civil Engineers for a great many years. I have been a member of the American Institute of Mining and Metallurgical Engineers, for, I think, 35 years. I was a director for one term a number of years ago, and am now director and vice-president of that organization, and I was chairman of their technical committee on coal and coke for four or five years, until it was made the Coal Division of the Institute two years ago. And I was the chairman of that for the first two years.

In addition to that, I am a member of a number of other societies, the Mining & Metallurgical Society of America, the Coal Mining Institute of America, the West Virginia Mining Institute, the American Economic Society, and a number of other institutions of that sort.

At the present time I am and have been serving as a member of what is called the Mining Advisory Board for the Carnegie Institute of Technology, which has a board composed of a number of engineers and members of the industry, to advise the officials of the college and keep them in touch with the industry, and also to help direct some of their research work. And I have been on that board, I think, for seven or eight years. I am also a member of their technical committee of their new Coal Research Laboratory, which was started about a year (1157) and a half ago, and which is spending a great deal of money and effort in pure research into the composition of coal. I was appointed on that committee as a representative of the industry.

I was given the Degree of Civil Engineer by Swarthmore College in 1895, and the Degree of Doctor of Engineering [fol. 754] by the University of Pittsburgh in 1928.

I am a director of Appalachian Coals, Incorporated. The company of which I am president has signed a contract with Appalachian Coals, Incorporated. When I was on the stand before, Judge Soper asked me if I would give an instance of the operation of freight differentials. I have prepared a map for that purpose. I also would like to call attention to a typographical error on this map here (Defendants' Exhibit 9). In the Mississippi figures, where the Appalachian territory is shown as 2.0 per cent of coal used there, while it should have been 0.2. That is, it is two-tenths of 1 per cent, instead of 2 per cent. (1158) That is in the state of Mississippi.

Judge Soper asked me if I could explain the operation of these freight differentials that we were ta-king about, and which are shown on the map. And this map, which is entitled "Freight Rates to Toledo, Lima and Findlay, Ohio," will illustrate the point that we had in mind, and which was rather hard to describe at that time (1159).

The Inner and Outer Crescent fields are surrounded by the heavy dark blue lines. One of them is marked "Outer Crescent" and the other "Inner Crescent."

The Ohio fields are shown as another crescent, which is inside the others, probably from 150 to 200 miles long, and in which the separate fields are shown; beginning at the south of the river is the Pomeroy; just west of that the Jackson; north of that the Hocking; then Cambridge, Coshocton, and No. 8, the Goshen, the Middle, and the Massil-

lon fields at the extreme north. The Hocking, the Jackson, the Pomeroy.

These fields (indicating) constitute the Ohio section in [fol. 755] here. These (indicating) are the Ohio mines.

The Pomeroy, Jackson, Hocking, and the No. 8 field are surrounded by a heavy dark blue line, from which leads a line marked 1.89, to a similar line surrounding a territory in northwestern Ohio containing Toledo on the upper end, Findlay in the middle, and Lima, Ohio. That means that to every point in the territory surrounded by that blue line, from Toledo to Lima, the rate is $1.89 from every point in the Ohio fields surrounded by the line that connects it to the first area.

The Cambridge, Coshocton, and the Goshen fields have a rate of $1.79. That rate is shown there; and the extreme northern Massillon field has a rate of $1.64.

The Inner Crescent, which shows here from Tennessee clear up through West Virginia, and surrounding most of the western Pennsylvania fields, has a rate of $2.39 to every point in that Ohio territory. That is shown by the "2.39" there, and (1160) that, of course, is 50 cents more than the general Ohio rate.

In the extreme north Ohio field, adjoining the Pennsylvania line, there is another area which has the $1.89 rate, the same as the southern portion of Ohio. Then the extreme Butler and Mercer field, just north of the Inner Crescent, has a $2.24 rate, or 15¢ a ton less than the main Inner Crescent section; and the Outer Crescent has a line showing $2.64, in the northern part of Tennessee, to all the points in the Ohio area, showing that that is 25¢ a ton more than the points in the Inner Crescent.

In addition to that, we have also shown the rates to that same Ohio area from the northern Illinois field, $2.65. From the Central and southern Illinois field the rate is $2.80; from the extreme southern Illinois field, $3.00; from Indiana, $2.21, $2.99 from the southern part of the State, and $3.31 from Western Kentucky. There is no fixed differential from that territory.

[fol. 756] The Appalachian territory that I have been discussing, which is marked here in red on the big map, comprises the southern part of the Inner Crescent, with the single exception of the southwest Virginia field, which is in the Outer Crescent. The other seven producing fields

are in the Inner Crescent—the southern end of it. (1161)

The southern part of the Inner Crescent is in the Appalachian territory and the southern part of the Outer Crescent is Appalachian. The extreme southern part is the southwest Virginia district and the Appalachian Coals, Inc. That is marked on the map, just what is included in the Appalachian Coals, Inc.

It is a little hard to see that. The arrow shows it, just under West Virginia. That is the extreme northeastern end, and the southern end is the extreme southern end of the Inner Crescent. Whereupon defendants offered in evidence a map showing freight rates to Toledo, Lima and Findlay, Ohio. It was received in evidence and marked Defendants Exhibit 23. (1161).

In my experience with the United States Coal and Coke Company it was necessary for us to familiarize ourselves with all the different types of coal that were available. When I first went with the Frick Coke Company, practically all of the blast furnaces in the northern portion of the United States north of the Ohio River used Connellsville coke exclusively. That was made in beehive ovens in the Connellsville region. In the latter part of 1898, when the first combinations were formed in the steel business, such as the Federal Steel Company, American Steel and Wire, the American Sheet and Tin Plate, and all those large combinations, they went into the Connellsville region, or in the territory immediately south of that, between Uniontown and the river, and bought up large areas of coal land and built beehive coking plants there, so that they would be sure of having their own supply.

When the United States Steel Corporation was formed those properties, of course, all were merged into the larger [fol. 757] corporation. Late in the nineties the Illinois Steel Company began using some Pocahontas coke made in beehive ovens in the Pocahontas region, and their results were so favorable that they secured the lease that I mentioned. We began to build the 3,000 coke ovens there which were called for (1163) under the contract, but they were not quite completed, on account of business reasons, by the end of 1905, when the Steel Corporation sent a committee of experts abroad to study the by-product coking industry. They came back and advised the cessation of all work on beehive ovens everywhere and the construction

of by-product plants. In accordance with that recommendation the first plant was built at Joliet, and I think began operation about 1908. After that time our work at Gary consisted entirely in shipping coal to that plant instead of coke, although they did operate the ovens up to the war. First they began using the Pocahontas coal, with coal from the Connellsville region in those ovens. Later they began, when the Elkhorn field was opened in 1913, to use a great deal of that coal—I think sometimes as much as two or three million tons a year were purchased, and they liked it so well that they stopped entirely the use of Connellsville coal in the western plants, using a mixture of, I think, at first, something like 60% Pocahontas and 40% Elkhorn. Later that was changed to a third Pocahontas and two thirds of high volatile coal.

Still later they found that they could use some Illinois coal in those ovens, and began the use of about one-third Illinois coal with a third of the Kentucky coal and a third West Virginia coal, using them indiscriminately.

That practice continued until the last few years, and I think a year before last it was stopped because they found then that the use of about 70 to 80 or 90 per cent of high volatile West Virginia or Kentucky coal with smokeless coal gave them cheaper coke than the use of the Illinois coal, so (1164) that practice has been stopped at their [fol. 758] plants.

In connection with this, as I said, we had to examine and be familiar with the character and uses of all types of coal for their purposes, and since I have been in private practice it has been necessary to keep in touch with all types and characters of coal, with their markets in all parts of this country, and also in the work we have done abroad to determine what coals are suitable and can be used, and where they are likely to move in the future.

There have been a great many changes since then in the uses not only of low volatile but of high volatile coals. For instance, in New York, up to about the time of the war, or shortly before the war, they used to have a movement of about four and a half to five million tons of Pennsylvania low volatile coal there for bunkers and steamships. That business now has practically all passed to fuel oil. There is certainly not over one million tons of that coal used there, and probably not over 50 per cent that much.

Some years ago Pennsylvania smokeless coals supplied New England with a great deal of its coal. Later that went to the smokeless fields of southern West Virginia and Virginia. Now they are being replaced by fuel oil.

The same situation has happened in a number of other places. For instance, about 1923 or 1924 the Carnegie Steel Company built an enormous by-product plant to supply all of (1166) their properties at Clairton, on the Monongahela river above Pittsburgh, using coal from their Connellsville mines, high volatile. At that time it was thought that they had to have a percentage of low volatile coal in order to make that coke entirely satisfactory, and for a long time—three or four years—there was coal shipped from McDowell county, West Virginia, with a $3.00 freight rate—a few cents above or below that—to that point to use in the ovens.

[fol. 759] It was discovered then, after some research work, that while that made the very best coke that they could get, that by changing their ovens a little bit, in the line of heating and the way they were burned, they could make a coke that was entirely satisfactory out of the straight high volatile coal there, and since that time there has been no low volatile coal used in that plant at all, and very little in any of the other plants around the Pittsburgh region, because it was not economical to do so. The coke was not quite as good, but it was plenty good enough.

That same movement is taking place in fuels, off and on, all over the country. It is not a rapid movement. It takes a number of years to do it, but they are changing from high volatile coal to low volatile coal and the use of coke instead of anthracite, or the use of fuel oil instead of coal, or the use of natural gas in place of either one of them. We are meeting it all the time.

[fol. 760] Vol. 6. HOWARD M. EAVENSON (Cont'd)

(1170) The United States Steel Corporation at their plants at Gary and Joliet have been using very considerable tonnages of southern Illinois coal in their by-product coke ovens. At one of the other plants in the Chicago district some Indiana coal has been used at various times in the past.

There is a plant to which the witness Tate referred the other day in his testimony in southwestern Illinois close to

(1171) St. Louis, which is operated I think under the management now of the Laclede Gas Company, which has been using southern Illinois coal almost exclusively for a number of years. I think at times they have used a little Pocahontas coal mixed with that, but as a general proposition they have used the Illinois coal almost exclusively. This plant is used to make coke for blast furnace purposes. I have the statement of the amount of coal that was used there in 1930, which is the last figure available, and in that year there were 565,362 tons of Illinois coal used in the state of Illinois in the making of by-product coke. Formerly they believed that they could not use Illinois coal at all, but later they found a very considerable area of low-sulphur coal in Illinois, and on account of the extremely low freight rate that it had to the ovens it made the resultant coke very much cheaper than when they were using West Virginia or Pennsylvania high volatile coal.

In the gas industry thirty or twenty-five years ago, almost all (1172) of the coal that was used in the gas in- [fol. 761] dustry came from the Pittsburgh seam, mostly from what is known as the Youghiogheny district, and along the Youghiogheny River and in the Irwin basin, but a considerable portion of it from the Fairmont field. At that time and until the last eight or ten years, perhaps even later than that, it was considered absolutely necessary to have an extremely low sulphur coal in order that the sulphur in the gas would be kept at the lowest possible minimum. Within the last few years methods of purifying gas have been developed to a commercial basis so that now it is possible to take out any amount of sulphur from gas on an econonmical basis, and from any kind of gas.

Now the gas making proposition has developed so that the coal that is used depends entirely on its ultimate cost. In other words, where the gas plants can secure a low sulphur coal at a reasonable cost they do so. If they are isolated and can use a local high sulphur coal at a lower cost so that the cost of the coal plus the cost of purifying the gas is less ultimately, they can and do use that. In other words, it is an economic proposition entirely. Each plant decides it for itself. And the ultimate cost of producing a thousand cubic feet of gas of the quality they want is what determines the choice of the fuel (1173).

Now another change in the use of coal has been in its use for other types of gas rather than illuminating, about which we have just been talking. When the natural gas supply began to diminish a number of years ago and a number of other types of gas such as producer gas and water gas were developed so as to provide a fuel for replacing the natural gas in the industries, why, that was [fol. 762] very desirable. These types of gas required the use, as many of them were used for metallurgical purposes, of a low sulphur coal, a great deal of which came from the southern fields, and also a large amount of it from Fairmont and from the Pittsburgh district. In making these types of gas a number of special machines were developed, most of which required the use of special sizes of coal. In other words, in making water gas from coal, for instance, some plants will want a coal that is, we will say, three inch by six inch egg. Another one with a different type of machine will want a two by four inch egg, or a two and a half by five, or something of that kind. And they are very insistent on getting that particular size. And it was largely to meet the requirements of concerns of that kind who had developed new machines for burning coal economically or for developing special uses of coal that the development of screening took place. It was not because the coal men wanted to do it. It was because every time a new machine was invented they had to have or thought they had to have a coal of a particular size that would give them the best results. And it was largely to supply those particular types of coal that these developments in screening took place. (1174) I would say that possibly as late as 25 years ago that a very great majority of the coal—perhaps as much as 75 per cent of it—was used as mine run. Practically at that time the only coal that was used—screened coal—was in the domestic trade. Now I think that in the high volatile fields I doubt if 25 per cent of it is used as mine run coal.

[fol. 763] By Judge Soper:

Certain roads use mine run coal in hand fired locomotives, but as Mr. Prosser testified yesterday, and as I think was testified before, in their stoker engines they use usually a coal through a two inch screen or a two and

a half inch screen or two and one-quarter, or something of that kind. And most of the big engines that are in use now use the stokers. On the yard engines and things of that kind where it does not pay they still use the hand fired locomotives.

By Mr. Donovan:

In the glass industry the natural gas is used wherever it is available. In fact the glass industry has preferably followed the natural gas supply, and there are many instances that any one familiar with that industry knows where plants were moved from one location to another following the failing of the natural gas industry. (1175) Lately, however, a great deal of producer gas is being used in the glass industry to supplant natural gas.

Producer gas is a gas of low heat value that is made from almost any type of fuel, and it consists largely of carbon monoxide, which is the unburned residuals of the burning of carbon, and is the same gas that we have in the automobile fumes discharged, which is a deadly gas. It has a heat value, and can be made from almost any type of fuel, and can be made very cheaply. That is being used to a very large extent, not only in the glass industry, but in other industries where a cheap fuel is essential. In making that, any type of coal can be used, the only limitation being the trouble that sulphur may possibly give [fol. 764] in the machines in which the gas is made. In other words, in certain types of coal with certain types of ash, the sulphur will fuse and mingle with the ash, and make a caking mass over the grates, that is very hard to remove. This, of course, may happen with other types of coal. It is more likely to happen with high sulphur coals. That is the only limitation placed upon sl*u*phur in the glass making industry, with the single exception that in certain types of glass, like glass for telescope lenses or instruments of that kind, or some types of very white bottles that the druggists want, the sulphur has a slight tendency to color the glass, either an amber or a red color, and for those purposes the use of a gas having very little sulphur in it is wanted. But that amounts to a very small percentage, not more than one-half of 1 per cent of the total industry, and for very special purposes. For any

other purpose in the glass industry, it does not make (1176) any difference whether the coal is high or low in sulphur.

Referring to the allegation on page 23 of the petition that the pig iron and glass industries can and do use Appalachian coal but that these industries cannot use Indiana, Illinois or Ohio coal, because of its sulphur content, I would say that in the pig iron industry they can use and are using Illinois coal, and have used some amounts of Indiana coal; and in the glass industry, they can use and are using both Ohio, Indiana and Illinois coal in large quantities. In fact, one of the Pittsburgh Plate Glass Company's large plants in the St. Louis district was using Illinois coal exclusively until a natural gas line was built in there, and then they turned to natural gas instead [fol. 765] of the coal. Any of those coals for making pig iron, as I already stated, can come from Pennsylvania. In fact, they use more Pennsylvania coal in blast furnaces, even now, than they do Southern coal, taking the industry as a whole.

Speaking of the industry as a whole, broadly speaking, with certain minor exceptions, due to special uses—mainly in the metallurgical business—or to certain types of equipment which are at the maximum, we will say, with certain types of coal, not only coal but any other type of fuel is interchangeable. By that I mean that in a broad sense, in the industry, the fuel requirement is purely and simply a question of how you can make your product at the lowest ultimate cost per unit for fuel. If you can do that (1177) with low sulphur or low ash coal, that is what is used. If you can get a different type of coal, with high ash and high sulphur, what we call a poorer coal, which will make the ultimate product at the lowest cost, that is what is used. If fuel oil will do it, the industry turns to fuel oil. If natural gas will do it, they go to natural gas, in a great many cases they have gone to electric energy, purchased, that is, where the demand of the industry is for power and not for heat, or some such process as that.

The fact of the matter is that in the coal industry itself, beginning about 1910 and 1911, when the large power plants first began to be introduced, almost all of the power plants at the coal mines were replaced by purchased power. At that time you could buy power cheaper than you could make

it in your own plant. Now, by reason of the decreased cost of coal and the inflexible rates for electric current that were developed after the war, the tendency is beginning to swing the other way, and I know for seven or eight power plants now that are being designed to replace electric power [fol. 766] at coal mines. In fact, I know personally of one plant, in the low volatile field, that has put in a Diesel engine plant, using fuel oil at a coal mine. I know of two others—not personally, but I know of them—where the same thing has been done. We are working, in my office, on a plant for three or four mines in the Harlan district, and we have a proposition there from a Diesel engine manufacturer, in which he guarantees to produce power with Diesel engines and fuel oil, which will be trucked about 50 or 60 miles, at not much more than half the prices we are now paying (1178).

By Judge Soper:

This is for electric current, purchased power. Of course, that is a poor advertisement for a coal mine, to put a Diesel engine plant in his own mine, but it just shows the tendency of the change in the industry, depending upon the economic proposition.

By Judge Parker:

Q. I would like to ask about this question of sulphur content of coal. The figures show that a large percentage of the coal used in Michigan and in Ohio, as I recall it, is coal from this Appalachian region.

A. That is true, your Honor.

Q. Is that because of the sulphur content of the coal mined in Ohio and Indiana, that they go farther away to get the coal which they use in local industries?

A. As far as it applies to metallurgical purposes, where they must have low sulphur, that is the case, but they can buy that coal at the same freight rates, and have bought it, in Pennsylvania. They can get just as low sulphur coal in Pennsylvania as they can anywhere else, now under the [fol. 767] present method of cleaning the coal there. That was not true some few years ago. But for steam coal, or any other purpose than that, or for domestic coal, the amount of sulphur has very little influence on the choice

of the coal. It depends on other factors—the preparation, service, or something of that kind, or the ultimate cost, as I said, per unit of product (1179).

The explanation of the predominance of Appalachian coal over Pennsylvania coal in Michigan and in Ohio is that at one time, as has been brought out here, practically all that coal was supplied by Pennsylvania and Ohio. The Southern mines began preparing their coal better, and making it cleaner. They began picking the slate out on picking tables, long before it was ever thought of in Pennsylvania. And very little of it is done in Ohio at this moment. Their screening was better. They gave better service.

One of the big factors was the fact that about every two years, when a new Union scale was to be made in Ohio or Pennsylvania, there was a let-down in the work that lasted from two to four months, and in one case in Ohio it lasted for 16 months.

Now, those interruptions for a plant that had no storage facilities, were very serious. Of course in the case of a big power plant that can store anywhere from 30 to 90 or 100 days' supply of coal, they could fill up their storage capacity, and it did not make a terrible lot of difference to them.

But if you had a small manufacturing plant, where you could not keep over a week's supply of coal, or perhaps two or three day's supply of coal, an interruption of that kind was a matter of great importance.

[fol. 768] Then, during the War, a great deal of that coal was required for home industries, and was zoned out of those States. So that feature made the Southern coals stronger.

By Mr. Donovan:

The expression "zoned out of those States" means that they were not permitted to shop their coal into Michigan, for example. Ohio coal was wanted (1181) in Ohio for their industries in that State, and Pennsylvania coal was wanted in the steel making industries of Western Pennsylvania, and it was not allowed to be shipped away.

By Judge Soper:

These were War conditions and you understand that if you once get into a market of that kind, the fuel habit is

a very hard thing to change. You get to like a certain type of fuel, and then unless you have some very serious reason to change, you just don't do it.

By Mr. Donovan:

This does not mean that the fact of your being in there other coals are not trying to get in there. The fact is that our coals stay in there largely because they like them, and because they give better service. But a great deal of that is done—well, for instance, other coal men, from other States, will put in a proposition, and then those people will tell the Southern coal man, "Well, we can buy, for instance Ohio coal or Pennsylvania coal or Indiana coal, at a certain price. If you want to meet that price, we will give you the business again." And there is a good deal of our fuel there, that is put there by us simply for that reason. We [fol. 769] are meeting their price every time, and those people like our service better. It is either furnished at the same price, or perhaps at a little bit lower price (1181).

By Judge Parker:

Coal of low sulphur content is desirable in certain industries and is necessary in the matter of some industries—yet coal of a higher sulphur content can be used in some industries, perhaps at a slight increase of expense and sometimes at no increase. Certain forms of sulphur make clinker on the grates, and for that reason it makes a little extra expense in firing.

By Judge Parker:

Q. With the exception of some industries, you say it can be used at a little increase in expense, and that it will be used at that little difference in price if it makes the coal of the high sulphur content therefore more desirable?

A. Absolutely.

Q. How much cheaper, approximately, if you can say, must coal of a high sulphur content be in order to take the place of coal of low sulphur content? How much difference in price must there be for that interchangeability?

A. Well, some of these salesmen who are in daily contact with that matter, can tell you more about that than I can. But I would say for domestic coal or steam coal

or anything of that kind in those States that 10 cents a ton at the present time, with the present scale of prices, they would change from one to (1183) the other. For smelting purposes, take the steel industry, and of course in coke-making, they make a limit of one-quarter per cent of sulphur in the coal that goes into their ovens, because it must not have more than a fraction of a per cent of sulphur in [fol. 770] the finished pig iron. The coal that they use in those industries is all low sulphur. The Illinois coal that they use—well, I think they use as high as 1½ per cent there, because the Pocahontas coal that they use, and the West Virginia and Kentucky high volatile coal, runs about one-half of 1 per cent. So that the mixture will not run over 1 per cent or 1½ per cent. They can use high sulphur coal to that extent.

But, as I stated yesterday, the Steel Corporation at the moment has abandoned the use of Illinois coal, because they found that the use of other coals at the moment is a little bit cheaper. I think they said a few cents a ton.

There are a great many considerations that come into that, besides the matter of the coal itself. For instance, in by-product plants, they get normally about 6,000 cubic feet of service gas to the ton, other than what is required to make the coke.

That can be used at their steel plants, or can be sold, or can be utilized in any way they choose.

They also get a certain amount of ammonium sulphate per ton. They get a certain amount of tar, from which they make benzol.

And it is the composite result that they get from the (1184) prices received from all these products, that determines the use of the coal. In other words, the coke will cost them so much. They get a certain amount for their ammonium sulphate. If they sell their gas at 20 cents, which is a fair price, that is another $1.20 a ton. And the tar will amount to 40 or 50 cents a ton.

These amounts will differ in different coals. But it is the ultimate result that determines the use of the coal.

Now, for instance, I spoke yesterday of the plant at Lynch. That is very low ash, low sulphur coal. At the [fol. 771] same time, if the corporation bought that, or within a month or two afterwards, they bought a large tract of coal in Mingo county, which is still undeveloped,

which had an ash content of about, well nearly 3 per cent higher than the Lynch coal, a little lower in volatile matter, and just a trifle more sulphur.

Well, at that time, as I recall, when we figured the total yield of coke, the Mingo County coal would make a little more coke per ton. When we figured the total yield in the making of the different by-products, the ultimate value of that coal only showed a difference of perhaps a couple of cents a ton.

By Judge Northcott:

The ultimate value of that coal only showed a difference of perhaps a couple of cents a ton. I will say two or three cents a ton. That is generally true about almost all these things.

Another point in that, in the matter of these Southern coals, with the extremely low sulphur and low ash, as a general proposition they do not make quite as strong coke as the Pittsburgh seam does. In other words, that is the strongest coking (1185) coal in the country. And that fact often offsets the lower ash and lower sulphur. It is all an economic proposition. It is figured out in the balance in the matter of dollars and cents, and whichever is the cheaper is the coal that is used.

By Judge Parker:

Q. I judged that was the reason they were using Appalachian coal in that section there now, was because it is cheaper, all things considered.

A. Yes, sir; when you consider service and everything else is included.

[fol. 772] Q. Your testimony, both from a theoretical and scientific standpoint, is that this other coal is interchangeable with Appalachian coal. Now, what I am trying to find out is, from a practical standpoint, whether there is real competition? In other words, how much rise in price there would have to be in Appalachian coal to cause a shift to other coal? Why the coals may be theoretically and scientifically interchangeable, yet from a practical standpoint there may be the matter of cost? It may involve too much expense. Tell me about that.

A. From the practical standpoint, it is exactly the same as the other way, with this single exception: If you take a man who has a boiler plant that is being forced to its utmost capacity, he may have to have coal of a very high heat value per ton, and very low ash, and low fusion point to ash.

For instance, in order to get the maximum result out of his plant, he may have to consider that very carefully, and he may have to have Appalachian or Pittsburgh coal or a coal of similar quality, in order to get that result. (1186)

But if in any other normal condition, where the plants are not forced so high, they can and do use other coals interchangeably, as has been testified to here, all the time. As a practical matter, and as a natural point of fact, if you take Appalachian coal, or any other coal, and submit it to a practical test; if you go to put your coal into the boiler house, and I have been in my boiler house, and I have been using coal of a certain type, and if I were the president of the company and went there, the chances are very good that I wouldn't know anything about it except that the fireman would say that that was the kind of coal he wanted, and you perhaps would find that the results in cost were satisfactory.

[fol. 773] You might put a car or two of coal in there that might be better chemically, and that might possibly be a little bit better in the plant, than what you had been using, my coal, but the difference in those coals is almost always less than the difference in the personal equation, or half a dozen other items that might enter into the matter.

By Mr. O'Brian:

The "personal equation" refers to the fireman, or people of that type.

I do not mean idiosyncracies, so much. But they have quite a bearing upon it. I mean that it is not possible for a man always to keep his plant right up to the very top-notch of efficiency, of operation from day to day, and even the weather or humidity has an effect upon that operation, which was shown last year, if he is using in his operation (1187) different types of coal. That is, for any plant, I mean.

By Mr. Donovan:

The preference of the fireman for a coal might have a great deal to do with it; and naturally so, because he has used that coal, and he knows exactly what it will do under certain conditions. And he has his boiler all drafted for it. When he puts in any new coal, he has perhaps a lot of changes to make. He has to change his draft, or the thickness of the fire bed, or has more ashes to take out. And it is human nature that he doesn't want to make a change. Perhaps it is inertia very largely.

By Judge Soper:

That does not only apply to the fireman, but perhaps to the management, when they are going along nicely, that they do not want any change.

[fol. 774] A. Yes; for there is no reason to change. They will say, "We are satisfied and are getting good service. We know what this coal will do, and can get it when we want it." That has as much to do with it, perhaps, as anything else. (1188) I think that one of the very great factors in the large use of the coal up in that section is the fact that those people knew that in the case of a strike or anything of that sort in the Ohio or Indiana or Pennsylvania fields that they would get their fuel at a reasonable price from the people that they were dealing with in the southern fields. That their mines would not be shut down because they were operating non-union, and that they would give them the service and the coal that they had been getting right along. And that has been true all of the time. And I think that that is one of the largest single reasons why there is so much of coal used up there. It is service as well as the quality of the coal, or perhaps even more.

Q. Then it is broadly true that in this industry science has its effects, education has its effects, logic has its effects, but they are all more or less influenced by the personal equation, and no man is wise enough to be able to say how those conflicting forces are going to work out in any particular territory over a long period of time?

A. That is exactly true, your Honor. Another thing about it, that I don't know that the court realizes perhaps as much as some one that has been in the business a long time. Of all the manufactured or mined commodities that

are produced in the United States we know that coal is the one thing in which the freight element is the biggest. In other words there is not a single thing in which the propor- [fol. 775] tion of the delivered cost is as great as it is in coal. Taking mining commodities alone, every one of them, with the exception of coal, goes through some refining process, so that (1189) the ultimate product that is delivered is all more or less alike.

Now what I mean by that is this. Take copper, for instance. If you go to buy copper on the market you specify that it has to be a certain percentage of pure copper, and there may be a little trace of silver in that or zinc, or other metals, but they are so trifling that you do not know whether your copper comes from Katanga in Africa or from Rhodesia, or Chile, or Lake Superior, or down in Utah, or perhaps up in Alaska. It is practically all the same product. It is the same way with zinc or lead or any of the other of the metals.

If you take coal, it is one of the most complex chemical substances that there is in the world, and we know practically nothing about its ultimate composition, or how, even yet, to get the best results out of it.

Now for instance, Mr. Allen spoke yesterday of the differences in different types of coal. We do not know yet what actually happens when coal is being burned. We are beginning to find out. But there is a lot of information of that kind we have not got at all. And really if you take analyses of coal—I could take the Blue Book and I could pick out two analyses of coal that would be almost identically the same. I could give those to any chemist in the United States and ask him to say if they were coking coals or not. And he might be wrong 50 per cent of the time and he might be right. If he knew where they came from he could generally say that is a good coking coal. But if he did not know that (1190), one of those coals might be a good coking coal and the other might not coke at all. We [fol. 776] do not know what makes coal coke. We haven't any idea. We are beginning to find out, but there has been very little work of that kind done yet.

Q. Is it true that coal is used practically as it comes out of the ground without preparation?

A. Of the total bituminous coal in the United States, your Honor, about 80 per cent is used as it comes from the ground, excepting that it is sized and the coarse slate or other materials are picked out of it. I think now—I may be a little high on this—I think now that possibly 20 per cent of it is washed or put through some preparation that further reduces the amount of ash, and usually the amount of surphur that is in it.

That is done practically always at the mines. There are a few manufacturing plants that do it. I am speaking of bituminous coal only. The consumers of coal are more or less influenced by the sales talk of the man in the business. That has a good deal of influence year in and year out. The sales talk, and the, we will say, the personality, as we learned yesterday, has a very large amount to do with it. And in many cases the (1191) seller of coal is personally acquainted with the buyer. He has dealt with him for years, and he gets the business partly on a friendship basis. But mainly because the purchaser knows that he will give him the service that he wants, and the price is fair.

By Mr. Donovan:

By "service" I mean giving him the kind of coal and the type of coal that he wants, and the ability to meet any reasonable adjustments that they want from time to time, and matters of that sort.

[fol. 777] In considering interchangeability of coal for steammaking purposes, as I have already partly explained, you can use any kind of coal at all. Excepting with the limitations that I put on it. You use anything from the very highest grades of low volatile bituminous coal to lignite, which has about half the heating value per pound. Depending entirely on your local conditions. Whether it is high sulphur or low sulphur depends entirely on the trouble that it makes in the firebox in the shape of clinkers.

In considering the interchangeability of coal for domestic purposes, you can go to any retail yard and buy any—almost anywhere, and get any one of a half a dozen different coals from different places. Some people prefer to use anthracite. Some want to have coke. Some want to use coal that has big lumps that they can handle that way. (1192) Some other people want it to be smokeless. And different people

buy low volatile. And the personal element, that is the feeling and prejudice, if we might say that, of the purchaser, has more to do with the domestic coal market, I think, than any other one element in it.

Prior to 1910 or 1911 almost all of the coal mines had a [fol. 778] power plant of its own. Some of them ran the tipple with steam engines or things of that kind, but inside the haulage is almost all done by trolley locomotives. But after the advent of the big power companies practically all of the mines now have gone to purchase power. And they buy it from some transmission line that will supply the field, and use it there (1193).

By Mr. Donovan:

In my practice we have had to study the various coal markets and the uses of different coals in these different markets. (1194) From our mines we ship coal to Southern Georgia. I think we have shipped a few tons to Florida; up to the head of the Lakes, where it goes through Minnesota, into the Dakotas. We ship large tonnages to Michigan, Iowa, Indiana, Illinois, and all that section through there—in general, all the section that is covered by the map here, from Ohio clear up into Iowa and the Dakotas, and Minnesota. I am familiar, more or less, with most of the markets into which coal from the Appalachian region and coals that will be sold by Appalachian Coals, Incorporated, move. Coal from Appalachian Coals, Incorporated, is not sold in any market where it will not meet two or three, and generally more, other coals. The fact that coal from the Appalachian region is sold in a greater proportion than other coals in certain markets does not indicate that Appalachian coal has not met other coals at the threshold.

In considering the decrease in the use of coal, (1195) we have had both an actual and a relative decrease in the last seven or eight years. Of course, the actual decrease is partly due to the industrial condition, but the relative decrease is progressing, due to entirely other causes.

The depressed condition in the coal business has had a [fol. 779] great deal of effect on the waste in the mining of coal. In most of the more progressive districts, in the country—and by that I mean the territory all through

Pennsylvania and down into Virginia, Kentucky and West Virginia—it has been the practice to recover the greatest possible amount of coal that was in the ground, that is, the greatest practicable amount; and in a great many mines—in most mines—it has exceeded 85 per cent; in a good many, 90 per cent, and in some even more than that. Since the depressed condition of the last seven or eight years, a good many mines have found that it is very much cheaper for them to lose a very considerable proportion of the coal in the ground, than it is to try to mine it. In other words, instead of recovering 85 per cent or more, a number of them have gone to a practice where they will not get, ultimately, more than from 60 to 65 per cent, because the ultimate result is cheaper than if they tried to mine the greater amount of coal. I think I could make the broad assertion that there is not a single bituminous mine in the country today that is not mining the very best coal that it has, and the cheapest, and is allowing portion of the mine to get into shape where a lot of the coal will never be recovered, because they cannot afford, at present prices, to mine it (1196).

As an instance of a decrease in the production of coal generally since 1920, the railroads have reduced the consumption of coal in their engines about 30 per cent. Public utility power plants, one of the largest consumers, within the last ten or fifteen years have reduced their consumption of coal per kilowatt hour almost 50 per cent. The steel industry has reduced its consumption of coal about 20 per cent.

[fol. 780] By Judge Soper:

The period covered is roughly since the War; that is, since 1918, within the last 12 or 15 years. Practically all steam users have been able to reduce their consumption considerably. It is difficult to give any figures for that, because they rarely keep any accurate records.

By Mr. Donovan:

The figures given relate entirely to the uses of bituminous coal. In detail, in 1920, the steam railroads used 170 pounds of coal per thousand gross-ton miles in the freight service. In 1931, this amount was 119 pounds, or a saving of 30 per cent. In addition to that, there is the roller bear-

ing locomotive that is traveling all over the United States. It is an (1197) experimental plant. It has moved, I think, over most of the main trunk lines from New England to the Mississippi River in all kinds of service, mainly freight, but in some heavy passenger service. That has averaged less than 90 pounds in that same service, and on certain divisions of the Chesapeake and Ohio Railroad the consumption was less than 40 pounds. That figure is not quite comparable to the other, because there is a certain amount of coal used in round houses, and so forth—not over 10 per cent—which does not show in this 90-pound figure, so that we are very likely to see a marked reduction in that item in the future.

In non-technical language, this means that a ton of coal does a great deal more work today than it did formerly.

In central power stations, for instance, in 1920, they used an average of 3 pounds of coal per kilowatt hour. In 1931, they used 1.62 pounds, or a saving of 48 per cent, and there [fol. 781] are several stations now producing a kilowatt hour for less than .8 of a pound, so that in the future we will see a still further reduction.

In the manufacturer of pig iron, in 1920 3,420 pounds of coal were consumed in the form of coke in making a gross ton of pig iron. In 1930, the amount used was 2,979 pounds, or a saving of 12.9 per cent. It is not likely that this saving can be increased greatly, although there is a possibility that sooner or later the reduction of iron ore will be done by electricity.

In the manufacture of steel, in 1920, a ton of ingot required the use of 5,450 pounds of coal equivalent, in the (1198) forms of coke, raw coal, gas, tar, and so forth, while in 1929 the amount was 4,580 pounds or a saving of 16 per cent.

The statement has been made, by component steam plant engineers, that with all reasonable economical fuel saving devices—and by that I mean devices that are economical under present conditions—it is possible to increase the saving from 16 per cent to 25 per cent. So that we will have still further reduction in this repect.

In by-product coking, by the saving of heat values in the by-product, instead of beehive coke ovens, in 1930 an equivalent of 7,607,000 pounds of coal, over 1920, has been saved, or 19 per cent of all the coal used in coking in 1930. As about

88 per cent of all coke is now made in by-product ovens, not much further saving in this line can be expected.

The use of pulverized coal in boiler plants has been increasing considerably, and there is quite an increase in efficiency in its use, over the ordinary methods—probably as much as 10 per cent, on the average.

[fol. 782] Whereupon the defense offered in evidence the following chart entitled "Annual Supply of Energy from Mineral Fuels and Waterpower in the United States." The same was then received in evidence as Defendants' Exhibit 24 (1201).

This chart is based on figures published by the United States Bureau of Mines in their department entitled "Coal", in each year, and here shows the figures as to 1931.

The figures are relative, showing the total consumption of energy of all forms as 100 per cent, with the percentages of each shown in various colors.

Now, for instance, beginning at the top, in 1909, the use of waterpower furnished 3 per cent of the total energy consumed in the United States.

In 1923, that figure had increased to 5 per cent.

In 1931, that figure had increased to 8½ per cent of the total.

In the matter of natural gas, in 1909 there was produced 3.5 per cent of the total energy consumed.

In 1923, it was 4 per cent.

In 1931, it had increased to 9 per cent.

In the matter of petroleum, in 1909 it furnished 7.7 per cent of the total energy.

In 1923, it furnished 20 per cent.

In 1931, it furnished 26½ per cent.

By Judge Soper:

Q. What is that subdivision, gas and fuel oil?

A. I was going to call attention to that. This figure on petroleum includes all energy in the raw oil, which is of course largely converted into gasoline and used in auto- [fol. 783] mobiles. But the part that competes directly with coal is in that gas and fuel oil subdivision.

They began to keep separate figures on that in 1919, and (1200) in that year it furnished 4 per cent of the total

energy. In 1923, it furnished 6.6 per cent of the total energy. And in 1931, it furnished 10 per cent of the total energy.

By Judge Parker:

Q. Explain that gas and fuel oil subdivision again.

A. Gas and fuel oil is the part that competes directly with coal. That is the part of petroleum that is not used in making gasoline for automobiles. In 1909, bituminous coal furnished 70.5 per cent of the total energy. In 1923, it furnished 60.3 per cent. In 1931, it furnished 48.2 per cent.

The anthracite in 1909 furnished 15½ per cent of the total energy. In 1931, it furnished just a shade under 8 per cent.

The chart shows plainly that the use of bituminous coal has been decreasing at a steadily increasing rate, with the exception of one or two years, due to abnormal conditions. For instance, in 1922 was the strike year, and in 1926 was the English strike.

By Mr. O'Brian:

This chart shows the percentage of the total energy furnished by each fuel, and is entirely relative. It is not the gross amount at all (1201).

Whereupon the defendants offered in evidence a chart entitled "Consumption of Bituminous Coal in the United States, by Railroads and Utilities and Steel Works." The same was received in evidence (1206) and marked Defendants' Exhibit 25.

[fol. 784] This chart was prepared under my direction, using the figures collected and published annually by the Bureau of Mines.

This table is made on what we call ratio paper, so that the sloping lines give the true ratio.

Beginning at the top, we show the total consumption of bituminous coal for all uses. That ranges from about 480 million tons in 1919, to about 365 million tons in 1931.

The next line under that shows, which is outlined in yellow, the consumption in pounds per thousand gross ton miles; the figures which I just gave, showing a decrease since 1920 from 170 pounds per thousand gross ton miles, to 119 pounds in 1931.

You will note that that has been practically steady, with the exception of the two years from 1921 to 1923, which were affected by the strike.

The line in brown below that, shows the total tons of locomotive fuel used, which has of course varied largely with industrial conditions (1202).

Immediately below that, in green tinted line, it shows the total consumption of coal in public utility power plants. It varies there from 33 million tons in 1919, to approximately 37 million tons in 1931.

But the interesting figure about that is shown in the green line, which shows a consumption of 3.2 pounds per kilowatt hour in 1919, and 1.6 pounds in 1931, showing a steady decrease in the unit of production all the time.

The consumption of coal in steel works, blast furnaces and rolling mills, shows a decrease from a little under 126 million tons in 1919, through varying amounts, to about 22½ million tons in 1929, which is the last figure available.

[fol. 785] By Judge Parker:

I don't know what that dip was caused by. I don't know why there was such a decrease. My opinion is that there might have been an error in the statistics.

By Judge Soper:

These figures show the total amount of coal used. The use of net tons of coal in the pig iron industry is shown at the bottom, showing a consumption of about 1.7 gross tons in 1919 to about 1.55 gross tons in 1930, which is the latest available figure (1203). This decrease in net tons of coal relative to the product, whatever it may be, is very largely due to the increased efficiency in burning coal and the improved mechanical devices and things of that sort. This has been progressing steadily since the War, very largely due to the increase in the cost of coal due to high freight rates at that time.

Q. May I ask you, whether there has been any chart or statistics prepared, or whether the testimony is already in, showing in a like period the increase in the available coal? I got the impression that along throughout some period when the use of coal has been decreasing, both relatively

and absolutely, that there had been an increase in capacity or in the available coal that could be mined. Is that true?

A. I was just trying to think what did show those figures. It is true that since 1923, when the railroads began to have all the cars necessary and to move them, that the [fol. 786] coal industry wanted, I mean; and until that time the industry had always been hampered for lack of transportation, but since that time it has been able to get 100 per cent of cars at any time it has asked for it, and that has resulted in everybody trying to increase his output. While the number of mines has not increased, the fact that coal men could get to market with their product, has caused the capacity to be increased (1205).

Q. Well, is that due entirely to the increase in the number of railroad cars? I had thought perhaps from the pleadings somewhere that one of the things which you gentlemen cited as indication of your bad situation was that during the war there had been a tremendous pressure put on to increase capacity.

A. There had been.

Q. And that made their present condition worse than it would have been had not that emergency arisen?

A. That is correct, your Honor, exactly.

Q. So it would go back of 1923 then?

A. Yes. We just make 1923 the figure because it was just about that time, after the railroads were turned back by the Government and they had begun to increase their efficiency and everything, that you could get 100 per cent transportation. It was never available before that time in the coal industry. I think Mr. McGarry's figures will bring that out plainly, with what you have in mind (1206).

By Mr. Donovan:

In addition to the increased efficiency in the use of coal the result of the discovery of the enormous gas deposits in California and in the southwest in volumes that were never thought of in the industry before has resulted in the [fol. 787] production of a terrific quantity of natural gas at absolutely unheard of cost. Now natural gas is not any new thing in this Appalachian territory, because around Pittsburgh and Ohio, West Virginia, parts of Kentucky, Indiana, we have had natural gas for forty to fifty years.

It has been used in industry. It has been used in domestic purposes. But about, for instance, in 1921 or '22 in Pittsburgh the natural gas companies advertised that they would not take any more customers. That they had all their lines could possibly supply, and in fact they began to cut off some of the industries. That was true in other places. The fields from which at that time they drew their supply had begun to show signs of exhaustion.

Since that time even in that territory, which is the oldest gas field in the country, they have begun to drill deeper wells, and have gotten wells there now that they never heard of in the old days. For instance, wells being (1207) brought in there every few months, right around Pittsburgh and Washington County that are four or five times as big as any wells they ever got before. These wells are in deeper strata.

By Judge Soper:

And since the drilling of wells in Oklahoma and Texas produced such enormous quantities of gas that a couple of cents a thousand feet of gas there brings in a terrific return on the investment.

And the natural gas industry is like a lot of other things. We have just begun to find out how little we know about it. [fol. 788] Now up until perhaps three years ago or four it was the theory that there was no natural gas east of the coal fields, or that there was no natural gas where the bituminous coal had a volatile matter of approximately 32 per cent. Well now they have gone clear east of that limit a couple of hundred miles and are producing wells up in Pennsylvania—I think the largest gas wells that have ever been found in the world are found up along the northern border, along the New York line, within a couple of hundred miles of New York, in the last year and a half or two years, and they are getting terrific wells in there. And in places where a few years ago if you had said there was a gas field they would simply have said you were crazy and let it go at that. There was no use of talking about that any more.

Now that has resulted in the laying of these enormous pipe lines from southern points. For instance, from the fields of Louisiana up into Memphis; from there and Okla-

homa into Chicago, Des Moines, St. Louis, Indianapolis, all through (1208) that territory. The lines have just been completed from the Kentucky fields across West Virginia, right through the coal fields, into Washington. And they will ultimately supply New York and the territory all through there up to between Washington, Baltimore, Philadelphia and New York. There is no question about that.

That gas has resulted almost everywhere in the replacement of large tonnages of coal. Particularly in a desirable business like the domestic trade or things of that sort, where you get a high price for it.

Then in addition to the natural gas the oil wells that have been discovered in those ter-itories in quantities that we [fol. 789] never thought existed at all have replaced coal to a very great extent.

By Mr. O'Brian:

Where the oil was discovered was mainly in California and Texas, and later in Mexico and Venezuela and Colombia, all of which is available to our country.

It has been testified to here repeatedly about the competition with coal along the seaboard. Well, it does not stop there at all. You go to any small town almost anywhere—take the middle west, Ohio, Illinois, Michigan, or any of those places, and you will find some Diesel engines running on fuel oil. Just as I said, there was a proposition to put a fuel oil plant in the Harlan field—a Diesel engine. There is already one in the New River field. And within this year in the Pittsburgh district at four steel plants there there have been 400,000 tons of coal replaced (1209) by fuel oil for use in producer gas for open hearth furnaces. And that was done by people that had their own coal mines.

Now it is not confined to the seaboard at all. Down there it is true everywhere you go that you can buy oil delivered and stored for you at a price that represents about the freight on the coal at the mine. Now it may vary from the mine to that point. It may vary sometimes 10 cents above or below. But substantially speaking you can buy fuel oil anywhere from Boston down to Texas and have it delivered to you over on a long term contract by thoroughly responsible companies, and they will agree to give you—in the case of one power plant that I know of in New York where

700,000 tons of coal was replaced, they furnished that oil on a three year contract; the first two years it was to be 65 [fol. 790] cents a barrel, the third year 80 cents, or less, if the market was less, and they agreed at all times to keep four days' storage of oil there, and that price represented substantially the freight on the coal to that point, without any allowance whatever for the coal. And the only change that plant had to make—that plant was using fuel oil—the only change they had to make was to lay a pipeline from the wharf about 200 yards to connect with the burners.

By Judge Parker:

Q. When you say the same price do you mean the same price per unit of power?

A. Per the equivalent ton of coal I mean by that. That is converting the oil into coal. Now that is going on everywhere.

To put a little personality into it, possibly: My (1210) brother has a textile mill in Camden. He is using I think about 10,000 tons of coal a year. He has used largely central Pennsylvania coal, although he has used some Maryland coal and some Fairmont coal. He has a proposition there now to install oil burners at I think a total cost, including some automatic apparatus to make it as free from labor as possible, at something like $10,000 or $11,000, and the saving on that every year over his coal price will be equivalent to that amount. (1213) That is just an isolated case that I happen to know, but there are thousands of those all over the country. It is a very serious condition.

By Mr. Donovan:

Whereupon defendants offered in evidence a table showing the consumption of fuel in the United States by public utility power plants and the production of electric power by fuels and by water power in the year 1929. This exhibit [fol. 791] was received in evidence (1214) and marked Defendants' Exhibit #26.

I prepared that table. It is based on the result of some studies that were published within the last month by the Department of the Interior, Geological Survey, and in cooperation with the United States Bureau of Mines, and

gives a county analysis of the fuel consumption and power production by electric public utility power plants in 1929. In connection with that, is the following statement: "These tables show another type of competition, an inter-industry competition between the several fuels. They prove that over large parts of the United States the price of coal is under continual competitive pressure from oil or gas or waterpower, or perhaps all three. Even in the region where coal is the only fuel used in power generation, there is practically always active competition among several different fields, all seeking the available business".

By Mr. O'Brian:

I am not reading from my own manuscript. This is from the publication of the United States Geological Survey, the bulletin that was issued by them, (1212) entitled "United States Department of the Interior Geological Survey, in Cooperation with the United States Bureau of Mines No. 63395; County Analysis of Fuel Consumption and Power Production by Electric Public Utility Power Plants in 1929".

By Judge Soper:

Q. Would you mind taking this chart, and just illustrating, in one of the regions, what it means?

[fol. 792] A. The table publishes these figures by counties, with the summary, and I have just summarized the figures by States here, and by districts, in order to take less space. It shows for each district the coal consumed in net tons, the oil consumed in barrels, with the coal in tons equivalent, which I figured in the next column; and the amount of gas. For instance, let us take the South Atlantic States, your Honor. We have been talking about them a great deal. That shows the total consumption in the States of Delaware, Maryland, the District of Columbia, Virginia, West Virginia, North and South Carolina, Georgia and Florida, as 3,822,774 net tons of coal in 1929. In addition to that, there were 2,262,438 barrels of oil consumed. Converting that into coal, on the basis of 3.6 barrels of oil per net ton of coal, that is an equivalent of 628,455 net tons of coal. Further, in West Virginia, there were 153,082 million cubic feet of gas consumed, and converting that into

coal at the rate of 23,000 cubic feet of gas, that is equivalent to 6,656 tons of coal, or a total equivalent coal in that section in that year of 4,457,885 net tons.

In the last two columns of the table, are shown the percentages of total kilowatt hours produced, first by fuel, and second, by water. In that section, North Carolina, for instance, 7 per cent of the total electric power produced by utility (1213) plants in that State was produced by fuel burning plants, and 93 per cent by waterpower. In South Carolina, there was 9.7 per cent produced by fuel, and 90.3 per cent by waterpower. In Georgia, there was 6½ per cent produced by fuel, and 93½ per cent produced by waterpower.

[fol. 793] I want to make the statement that in the conversion ratios the figures I used are not quite the same as those used by Mr. Tryon. Different authorities use different ones, and I have taken the figures here that were used in a study of the competitive position of coal, by the National Industrial Conference Board. These figures were published by the National Industrial Conference Board in a book entitled "The Competitve Position of Coal in the United States," which is a very illuminating volume. The National Industrial Conference Board is one of the foundations that studies industrial problems and they were commissioned by someone to study the competitive position of coal as compared with oil and gas, and the results of that survey were published in this book (1214).

By Mr. Donovan:

The Government witness Tryon used the figure of 4.2 barrels of oil, and I think 25,000 cubic feet of gas, per ton of coal. That would not affect these figures more than a comparatively small amount so that the result would be substantially the same because the coal used is only 12 to 14 per cent of the total anyway.

Whereupon the defendants offered in evidence a table showing the annual supply of energy from mineral fuel and waterpower in the United States between 1819 and 1930. This was received in evidence (1216) as Defendants' Exhibit 27 (1215).

I prepared this table. This table is prepared from the data alreadey referred to as published by the United

States Bureau of Mines, and which is shown graphically on Defendants' Exhibit No. 24. Defendants' Exhibit No. 27 is prepared on the figures published by the United States Bureau of Mines, showing the consumption of an- [fol. 794] thracite, bituminous coal, domestic oil, natural gas, imported oil and waterpower, giving the total of the coal used, the total of mineral fuels used, and the grand total, including waterpower. This figure includes the amount of petroleum that is used in the form of gasoline (1216).

Whereupon the defendants offered in evidence a table showing the per cent of total heating value contributed by the several mineral fuels, in the United States, 1819 to 1930. This was received in evidence and marked as Defendants' Exhibit No. 28 (1218).

I prepared this table. This table is based on the figures in Exhibit No. 27 which was just submitted, excepting that this shows only the percentage, while the other table showed the total amounts. These are the figures that are used in Exhibit No. 24.

This shows that in 1920 the total oil and gas was 19.3 per cent of the total and in 1930 it was 35.7 per cent of the total, or almost double. In 1920 bituminous coal produced 69.3 per cent of the total energy and in 1930 that figure had dropped to 55.7 per cent of the total, or a loss of almost 20 per cent (1218). That is 20 per cent of the amount of bituminous coal used, not of the total amount of energy.

Whereupon the defendants offered in evidence a table showing the per cent of the total amount of bituminous coal, fuel oil, and gas used for different purposes in 1928 and 1929. This table was received in evidence (1219) and marked as Defendants' Exhibit No. 29.

[fol. 795] I prepared this table. The table that is shown is one that shows the percentage of the various purposes for which bituminous coal was used in 1928, which is based on the data from the Bureau of Mines publications, and the percentage of fuel oil used for various purposes in 1929, which is based on the Bureau of Mines publications (1219).

And also the percentage of natural gas that was used for various purposes in 1929 based on another publication of the Bureau of Mines. I might add that this table was prepared and presented at the Third International Conference on Bituminous Coal in Pittsburgh in 1931, by Mr. R. B. Harper, vice-president in charge of Research and Testing, Peoples Gas Light and Coke Company of Chicago. The figure of 27.7 per cent opposite Railroad Fuel means that of all of the bituminous coal used 27.7 per cent thereof went into railroad fuel and 16 per cent went into coke ovens and 19 per cent into what we call domestic, which includes small industries that cannot be separated. In other words, those figures are not broken down, or are not kept in a way that they can be broken down into specific industries in a good many cases.

But I might explain that this is the best data available.

In the matter of fuel oil, it shows that 20½ per cent of that was used in locomotives. 15 per cent was used in the production and operation of oil refineries. 24½ per cent was used in bunkers as against 1½ per cent of coal (1220).

Whereupon the defendants offered in evidence a table headed "1929 Production of Natural Gas, Petroleum and [fol. 796] Coal in the United States by States." This was received in evidence (1224) and marked Defendants' Exhibit No. 30.

I prepared this table. These figures were based on publications of the United States Bureau of Mines, but came from the same paper that I have referred to, by vice-president Harper of the peoples Gas Light and Coke Company of Chicago. They show the production by states of natural gas in millions of cubic feet, of petroleum in millions of 42-gallon barrels, and of coal in thousands of short tons, together with the percentage of each.

By Judge Soper:

Judge Soper: May I ask this generally in regard to this case, not merely of this witness but of counsel; In the making of these charts, perhaps not the most of them, the year 1929 has been used, sometimes solely and sometimes along with other years. Would it be a fair thing in preparing the filings of facts in this case, to use the year 1929 (1220) as a typical, normal year?

Mr. Donovan: I think that year was used because it was something above normal, your Honor.

Judge Soper: It would represent a good year, would it? [fol. 797] The Witness: It would represent a very good year.

Mr. Donovan: Yes, your Honor, I understand it would represent a very good year.

Mr. O'Brian: I think the defendants' figures of distribution that were put in, and I am speaking now only from recollection, were only for the year 1929.

The Witness: That is correct.

Mr. Donovan: That was the last year available, was the reason.

Mr. O'Brian: So in preparing our Government exhibits we took the year 1929 on the assumption that that was a fair comparative basis.

A. Your Honor, that year was taken because there have never been but two sets of distribution made in the United States. One was made in 1918 by the United States Fuel Administration, and then a later one in 1929, which year was far above the average as a bituminous year. That was the reason why it was taken, that it was the last date that we could show a breakdown in the various states. Normally these figures are not published at all (1224).

Whereupon the defendants offered in evidence a table headed "Estimated Replacement of Bituminous Coal Consumption in 1930 in the United States by Natural Gas, Fuel and Gas Oil, Water Power and Other Energy Sources." This was received in evidence (1227) and marked Defendants' Exhibit No. 31.

The table was submitted in the same paper that I have already referred to, by Mr. R. B. Harper, vice-president of the Peoples Gas Light and Coke Company of Chicago, and [fol. 798] is prepared by a man interested in the gas industry, and I take it as perhaps likely to be more unprejudiced, at least as far as coal is concerned, than an estimate from a coal man.

This table shows the estimated replacement of bituminous coal consumption in 1930 in the United States by natural gas, fuel and gas oil, water power and other energy sources. It is based on the assumption that bituminous coal would have maintained its upward trend in percentage in the en-

tire energy supply in the United States from 1915 to 1930 if the competition with the available supply of other kinds of energy had not existed, due to the rapid expansion in the use of these sources.

In figures it shows that in 1930 there were used—that (1225) estimated actual consumption, which is close to the actual figure, of 445 million tons of bituminous coal. The replacement by natural gas estimated on the actual consumption in 1930 was equivalent to 37 million tons of coal.

The replacement by fuel and gas oils, also based on 1930, was the equivalent of 82 million tons of coal.

The replacement by water power for the same year was estimated at the equivalent of 82 million tons of coal.

The replacement by miscellaneous energy sources was another 35 million tons. Making a total replacement of 235 million tons of equivalent coal.

If we had not had this replacement our total production of bituminous coal would have been the 445 million tons plus 235 million tons, or 680 million tons of bituminous coal.

Compared with 1929 we would have had to add approximately 235 million tons to the 550 million tons so that that year would have been approximately 785 million tons of coal; although the replacement, of course, in 1930 was [fol. 799] slightly greater (1226) than in 1929 and had been increasing each year, but approximately we can say that there have been various estimates made ranging from 200 million to 275 million tons, and I think this is probably as nearly correct as any of them.

By Judge Soper:

Q. I do not understand one thing about the chart. Take the last column, I think I understand what that means. That is, of the total energy coal furnished 65 per cent and these other replacement items 35 per cent, approximately.

A. Yes.

Q. But were not all of these replacement items active at the beginning of this period?

A. At the beginning of 1915?

Q. Yes.

A. To some extent, your Honor, yes. Now he means in this that would be the total energy. Of course there is al-

ways a certain amount of water power that is used anyhow in certain places, and was before 1909. About 3 per cent of the total.

Q. What I am getting at is this. Does this 35 per cent represent increase of power furnished by natural gas, fuel and gas oils, water power, and so forth, over and above the power from those sources in 1915?

A. No. This is the total. The total amount. The equivalent of coal in 1930. The ratio would be, I think approximately shown on figure 24, the chart that we showed there. As far as I know this is the best information that is available, and it is published by somebody who certainly had no interest in making it bigger for coal (1227).

By Mr. Donovan:

There is an association that is entitled "The American Oil Burner Association", which is formed to promote the [fol. 800] sale and use of oil burning apparatus, and I have some figures which have been published by that Association. They estimated that in 1921 there were about 12,500 domestic oil burners in use. In 1931 that had increased to 774,500. Or more than sixty times as many. And that at the later time, 1931, there were in addition about 42,500 commercial oil burners. That would mean places like laundries and apartment houses, and things of that type. Of all these about 50 per cent were in states in which most of the production of coal sold by Appalachian Coals, Incorporated, will move.

By Mr. O'Brien:

These states would be Florida, Georgia, North and South (1228) Carolina, Virginia, Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Minnesota.

By Mr. Donovan:

Coal produced in the Appalachian region competes with natural gas and fuel oil and electricity generated by water power in the markets mentioned. It compet-s with them everywhere they are encountered. There are some towns that do not have a supply of natural gas available in that territory, but there is another source of gas which has come into the market in the last three or four years, and

that is what they call butane and pentane. They are two gases that are in the same series as methane, which makes the most of natural gas. They are a little higher in the series, and are gases that can be converted into a liquid at practically atmospheric pressure and no temperature. In other words, by merely compressing them they are put into a liquid from which they will expand and act as a gas. They are made in gasoline production, and in a number of small towns in the middle west—I know of two or [fol. 801] three in Indiana, and there are undoubtedly others—they ship either one of these products into the small gas plant in tank cars and then distribute it through the lines already laid to the houses, where it acts exactly as natural gas would do. And in that way they replace the expense of using the coal gas-making equipment in those towns.

Now that can be done anywhere where there is a railroad service to those places. It is not intended at all to supply gas in volumes of the bulk that natural gas is, but it is just another off-shoot and one that will give us a great (1229) deal of competition. There are other cases where coal has been substituted by other fuels. These are not complete at all.

In the city of Baltimore some years ago the power plant there, the utility plant, consumed about 300,000 tons of Fairmont coal, which was entirely replaced when the first one of the Susquehanna water power plants was built.

I have already mentioned that 400,000 tons of coal have been replaced in the Pittsburgh district by oil in this year.

The Aluminum Company of America has a plant in the St. Louis district for which they furnished the coal from their own mine over their own railroad. Upon the completion of the natural gas line into St. Louis they stopped operating the mine and replaced the coal by natural gas. (1230) The Pittsburgh Plate Glass Company has a plant at Crystal City in the St. Louis district, where they were using Illinois coal, and they stopped the use of that and replaced it with natural gas. The bunker coal in New York, as I have already testified, has suffered a loss of approximately 4 million tons to fuel oil in the last 15 or [fol. 802] 18 years, and there is another plant in New York Harbor where 700,000 tons of pulverized coal was replaced by oil last year. These are just a few of the many in-

cidents that I can recall, and many of the other witnesses here can testify to others.

I know of two instances where the use of various types of ore has influenced the use of coal for making coke, one where it has replaced other types, but the other case will illustrate this.

In Alabama, for instance, in the coke ovens there, they habitually used a coal that will run from one and a quarter to 1.4 per cent sulphur, and what we would call a coal in the North that would be totally unsuited for that purpose for that reason. They are able to do that because the iron content in the ore there is much lower than it is at the Northern furnaces, and the increased sulphur is carried away by the additional fluxing material.

The Bethlehem Steel Corporation, and its Sparrows Point plant, has its own coal supply. It has both its own ovens, and its own coal supply, and has available at that point Pennsylvania coal and Fairmont coal, and even coal from the Appalachian (1231) region by water. Since they began the substitution of Chilean ore, which is an exceptionally low sulphur iron ore, for the Cuban ore which they had been using, they have been able to use a much higher sulphur coal in their coke ovens than they were before. In other words, what governs is the total amount of sulphur in the ton of the finished product, and if they can use a higher sulphur coal by reason of having a low sulphur ore, they do it. It is just another case of the economic balance in the finished material.

I am familiar with most of the properties in the Appalachian district in a general way, and have made an estimate of the undeveloped areas in that region. This is [fol. 803] necessarily approximate, and I think is very conservative.

In the territory in the eight districts in Appalachian Coals, Inc., not held by any operating company or by any captive company, there are approximately 760,000 acres, which will contain more than 4,300,000,000 tons of recoverable coal. In addition to that amount, in the same territory, owned by captive companies and not being operated, or owned by operating companies who are only using a very small proportion of their holdings, there is an additional 860,000 acres, containing more than 4,600,000,000 tons of coal.

So that there are available within the 24 counties, and immediately adjacent to (1231) them, in those eight producing districts, on railroads that are already there, with the exception of short feeder extensions, there are over 1,620,000 acres of coal-bearing land, which will contain approximately at least 9,000,000,000 net tons of recoverable coal. That is coal that, at the present time, would be comparable—perhaps some of it is a little thinner than is being worked now, but it would be comparable with the coal, both in quality and mining conditions, that is now being mined in that section.

The opening up of that acreage would, in some cases, involve the extension of short branch lines from the railroads and the building of mining plants. This is in addition to the increased capacity that could be gotten from the present existing plants, if it were necessary (1233).

I am familiar with the values of coal land in the Appa- [fol. 804] lachian territory based upon royalty value and upon sales value. I have had experience in the sale of coal land in that territory more than in the purchase of it. The market price of acreage in that territory today would be less than half what it was two or three years ago, and on the basis of royalty values in that region there are very few mines being opened, but in many cases leases that were made years ago on rates of royalty which at that time were considered fair, are now being revised and reduced very considerably. That movement is very extensive all over that territory.

From my experience and knowledge of markets (1234) Appalachian Coals, Incorporated, will not be able to monopolize the sale of coal in any market, or any part of any market in which it will sell coal. In my opinion, it is absolutely impossible for anybody to monopolize the sale of bituminous coal in any area of the United States. The reason I say this is that there is such a terrific amount of coal that is available, not only outside of Appalachian Coals, Incorporated, but ready to be developed if it is worth while to do it.

By Judge Parker:

Q. Will the restriction on competition which inevitably results from the formation of Appalachian Coals, Inc., affect the price at which coal would be sold?

A. I do not think it will affect it at all, your Honor. I hope it does.

Q. Will you give the reason for your opinion?

A. The reason, of course, is that there is so much tonnage that is available outside of our immediate portion of [fol. 805] the field. There are so many other fields that can enter into competition with any of these areas, and if we did raise the price, it would be business suicide, because the oil and gas people would immediately begin to flood that territory. I do not think it is possible to do it. (1235)

By Mr. Donovan:

Even if they wanted to, I do not think they would be able to fix the price of coal in any market in which they could sell coal. I say this for the same reasons I have already outlined.

In the case of an owner of coal land, taxes and carrying charges have a very large effect on the development of that land. I know of thousands of acres of coal lands all over Kentucky, West Virginia and Pennsylvania that are being surrendered to the State now, and have been in the last two or three years, because the owners can no longer afford to pay the taxes on them. That movement is general. In some counties, I know that as much as 40 per cent of the undeveloped area has been surrendered for that reason. To show what effect it has on one operating company, take the case of the Pittsburgh Coal Company. This year their charge for taxes will be in the neighborhood of 13 to 15 cents a ton. (1237)

The other thing that an owner of coal lands has attempted to do in order to meet taxes and carrying charges is to try to get someone to open the property on a lease basis, and develop it. That is a very hard matter to do, these days, under these conditions existing in the coal industry.

From a technical standpoint, the advantages that the coal producers contracting to sell their coal through Appalachian Coals, Incorporated will gain, will be that I think the Appalachian Coals, Incorporated, will be able—well, I [fol. 806] don't think it; I know it, I may say, if it is put into operation—will be able to give a service of that sort that will be better than anything that has ever been done in the coal industry.

Now, I have in mind in that matter two specific things: there is nobody in the coal industry who has ever had the money or the time to make a thorough census of his market, in order to determine just how much coal of each particular kind could be used; what the type of equipment is, and what is the best coal suited for that purpose.

One of the large Northern companies has made such a study (1238) for its own immediate territory, but has not been able to extend it over all the territory it reaches.

And neither is any other company, even the large ones, because of the expense involved, able to do it.

Appalachian Coals, Incorporated, would be able to do this. And in so doing, or by reason of having this information, I think there are many cases where the proper engineering advice would enable them to retain, and in some cases even to recapture plants that are either going or have gone to the use of other coals or gas.

In other words, the oil industry and the gas industry are thoroughly developed. They have organizations that are continually pushing their products. They can give the best technical advice that there is on the subject.

But there is absolutely nothing in the coal business that can combat that, except in a very few isolated cases.

An organization of this kind can do that. It might meet that situation on their same terms and we could be able to show anybody just what he could do to his equipment, or what kind of coal he could use, in order to get the maximum efficiency in his plant.

[fol. 807] Another instance that I have in mind of that kind that only such an organization could work out, is the use of pulverized coal in domestic furnaces. There are now at least two different makes, and I know of one or two others that are being developed, of equipment of this type that could be used in domestic houses.

But there is no source of supply from which they can obtain (1239) their pulverized fuel, except by putting in a plant of their own.

Now Appalachian Coals, Incorporated, could afford to go to a city, like Ashville, we will say, and introduce this type of equipment, and put up a pulverizing plant there to furnish the type of coal that is best suited for that purpose.

And I believe that some such proposition as that, in addi-

tion to the use of the small domestic stokers, is the only way that we can every meet the competition of the oil and gas people.

They have a luxury value in there, if we want to call it that, that they are willing to pay for. And we have to minimize the trouble of burning coal, and of handling it into the house, and the trouble of taking the ashes out, if we expect to meet their competition.

No individual, or even no large company, can afford to do work of that kind, because immediately it is shown that it is a good proposition, why, their competitors will jump right in without having the initial expense, and do the same thing (1239).

[fol. 808] I am familiar with the coal producing fields of the United States. The United States Coal Commission in their work in 1923 divided the fields into 92 different fields, the exact areas of which are described fully in Part IV of their report, on page 2035 and following (1240).

Now, in a number of cases, they have subdivided these fields, rather more than they are usually subdivided in the coal industry. For instance, in Western Pennsylvania, in the Pittsburgh section, they have three fields there, which we ordinarily call Western Pennsylvania or Pittsburgh District. But they have a list of those fields, and describe the areas in each one, and the mines that are generally considered as belonging to them (1240).

I am familiar with the production of these fields, the number of mines and the markets into which the coal moves. As to three fields, Nos. 1, 2 and 3, in Western Pennsylvania, which mine the Pittsburgh seam of coal, and are called by the Commission, "the Pittsburgh-Connellsville-Westmoreland-Ligonier field", in the trade they are usually called the Pittsburgh, Connellsville, Irwin and Greensburg basins; in 1923 those fields produced 94½ million tons from 935 mines, and in 1930 they produced 68,627,000 tons from 399 mines (1240).

The coal in those fields is a high grade bituminous coal, and is used for practically all purposes for which any bituminous coal is used. It is a high grade gas coal. It is the area of which I spoke as the Youghiogheny gas coal. It is a high grade coking coal, suitable for any metallurgical purpose whatever, from by-product coke making to gas or any other purpose (1241).

Generally the coals there are slightly higher in ash and sulphur than the Southern Appalachian coals. On the other [fol. 809] hand, they have, as I have said, a higher coking quality, and can be and are being used indiscriminately with the Southern coals.

Since the installation of their cleaning plants, in the Pittsburgh District, there are now commercial plants, and I think six of them, all of large capacity. They can produce coals from the Pittsburgh region that run as low in ash as 4 or 4½ per cent, and as low in sulphur as a seventh or an eighth of 1 per cent. And they can compete and are the equivalent in every way of the highest grade coals that are produced in any of the fields of the United States. Some of these coals are also high fusion point ash coals.

That coal is used around gas plants and coke plants in Northern New York, around the Pittsburgh district, and some of it is shipped into Canada, to Montreal and Hamilton; and it is shipped to the head of the Lakes and used up there in by-product and gas plants, and mixed sometimes with our coal and sometimes without it; and is used to some extent in the New York Harbor, and in Eastern plants around there, and in Philadelphia. A large tonnage of it goes to the head of the Lakes.

There is a large market around the Pittsburgh section for coal. I think perhaps the triangle from Pittsburgh to Cleveland and to a point East to Rochester, New York, perhaps, is (1242) the largest consuming district in the United States.

But unfortunately for the commercial people, the most of it, the largest percentage of the coal used there, perhaps, is produced by captive plants, and which is the same quality of coal, of course (1243).

The next adjoining fields are Numbers Four and Five which are working the Freeport and the lower seams in western Pennsylvania, and are called by the Coal Commis- [fol. 810] sion the Freeport and the Butler-Mercer Fields. The production of Field Number Four in 1923 was 12,338,000 tons, from 123 mines, and in 1930 was 9,148,000 tons, from 72 mines; the production of Field Number Five in 1923 was 2,587,000 tons, from 110 mines, and in 1930 was 1,439,000 tons, from 65 mines. The same causes that have reduced the consumption of coal in the Western Pennsylvania fields generally have reduced it in these fields. Now

some of that Freeport coal is used by the steel plants for use in their by-product coke ovens. And I might instance a case of one of the companies that had a plant there, that has abandoned that plant, or at least shut it down, and has leased a large tonnage of coal in the Elkhorn district.

And in that connection I might mention also that a Cleveland By-product plant, which has an operating mine in the Elkhorn district, has abandoned that plant and is now buying its coal from northern West Virginia in the Fairmont District. Just showing the interchange of movements in the different coal for various reasons. The Butler-Mercer veins are thin, and that coal is used only for local steam and domestic purposes.

Now Field Number Six is in the northern part of Pennsylvania, and is a local territory known as the Blossburg field. Its production in 1923 was 498,000 tons, from 20 mines, and in 1930 was 216,000 tons, from 14 mines. It has local importance (1244) only.

Field Number Seven is another local field in the south-central portion of Pennsylvania, known as the Broad Top Field. Its production in 1923 was 1,430,000 tons, from 63 mines, and in 1930 was 1,049,000 tons, from 48 mines. The coal from both of these fields is used largely for steam and domestic purposes throughout eastern New York and eastern Pennsylvania. It is all a medium high volatile coal.

[fol. 811] Fields Numbers Eight and Nine, called respectively the Somerset and Central Pennsylvania Fields, are known in the trade as Pennsylvania low volatile coals. The production in 1923 was 60,136,000 tons, from 1,617 mines, and in 1930, was 44,093,000 tons, from 748 mines. There are a number of seams in this territory, practically all of which are thin, but they yield a low volatile coal that is sold on the market as smokeless. The structure of this coal, like all smokeless coals, is very soft, and is shipped largely from this territory on a minerun basis for steam purposes, although a little of it is prepared in the lump sizes and shipped both east and west for domestic purposes. Some of this coal is now being shipped to the steel plants around Pittsburgh for use in the coke plants, there mixed with the higher volatile Pittsburgh coals. In 1920, as I have already said, a very large tonnage of this field went to the New York market for bunker purposes, but this use has practically disappeared, due to the substitution of

oil. Most of this tonnage is used throughout eastern Pennsylvania, New York, New Jersey and in New England for steam and railroad purposes. This coal is generally about the same or a little lower in volatile (1245) matter than the southern coals, but is nearly always slightly higher in sulphur and ash than those coals, and it is generally somewhat softer (1249).

Field No. 10 is called by the Coal Commission the Maryland-Potomac Field, sometimes called in the trade the Cumberland-Piedmont Field. In 1923, the production was 3,890,000 tons, from 159 mines; in 1930, the production was 3,773,000 tons from 108 mines. This consists of the Pittsburgh and other seams of lower coal in Maryland and Northeastern West Virginia. The coal is soft in character, is a medium or low volatile coal, and is almost entirely [fol. 812] used for steam purposes around Baltimore, Washington, Philadelphia and so forth.

Field No. 11, in West Virginia, includes most of what is generally known as the Fairmont field. Its production in 1923 was 22,883,000 tons (1249).

By Judge Northcott:

The reference to Northeastern West Virginia is in the Davis section near Frostburg and that territory in the extreme Eastern part of the state. It runs into Maryland which is the Piedmont Field. The other was the Fairmont Field. The Fairmont Field would include the Morgantown territory.

That production in 1923 was 22,883,000 tons, from 309 mines; in 1930, 19,991,000 tons, from 123 mines.

The coal in this field is from the Pittsburgh and Sewickley (1250) seams, a great preponderance of it from the Pittsburgh seam.

As between Sewickley and the Pittsburgh seams, the Pittsburgh is the lower. The Sewickley seam is mined quite extensively in the Morgantown section. In some places the Pittsburgh seam is under the surface, that is, under the drainage.

In some places it is drift. In some places there are shallow slopes, and in some places both are developed in shafts, but generally the Sewickley is developed as a drift mine, and the Pittsburgh occasionally as a drift; more often either as shaft, or slope.

Around Morgantown it runs mostly by shallow slopes. The upper mine is drift. The Pittsburgh seam predominates very largely. It is rather firm in structure, and some of it low enough in surphur to be used for metallurgical [fol. 813] purposes. As we have already testified, some of it has been exported to Europe and to Egypt, particularly for gas coal, and it is used for blast furnace coke and for steam and domestic purposes, both east and west. The largest market is around New York, Baltimore, Philadelphia, in New England and Ohio, where a great deal of this coal is used for railroad purposes, on account of its cheapness (1251).

Field No. 12 lies along the Ohio River in West Virginia, and Eastern Ohio, and is known as the Panhandle-Pittsburgh No. 8 Field. Its production in 1923 was 25,529,000 tons, from 233 mines, and in 1930 was 16,587,000 tons, from 166 mines. This coal is almost entirely from the Pittsburgh seam, and is too high in sulphur for any metallurgical purposes. It is used largely throughout Northern West Virginia, Ohio, Michigan and Western New York, for steam and domestic purposes, and a great tonnage of it is shipped into Canada and the head of the Lakes, for railroad use.

Field No. 13, known as the Pomeroy Field, in Ohio, along the Ohio River, near Pomeroy, had an output in 1923 of 1,309,000 tons, from 41 mines, and in 1930, of 593,000 tons, from 26 mines. The field itself is in the Southeastern part of Ohio, along the Ohio River, and the product is used for steam and domestic purposes entirely. Its importance is rapidly diminishing.

Field No. 14, in Putnam County, West Virginia, had an output in 1923 of 345,000 tons, from 10 mines, and in 1930, of 358,000 tons, from 3 mines. Its product is almost entirely steam and domestic coal.

Fields Nos. 15 and 16, are called the Kenova and Thacker Fields, and are situated in extreme Southern West Virginia and Kentucky, and a small portion in Virginia. The output in 1923 was 8,252,000 tons, from 127 mines, and [fol. 814] in 1930 was 10,288,000 tons, from 65 mines. This coal is all high volatile, and is usually a high grade coal. Much of it is shipped to Central Western and Eastern points for gas making purposes, and the (1252) products of several of the seams of coal are shipped throughout the Middlewest for high grade domestic coal. A considerable

tonnage is shipped to the Lakes for steam coal, and the rest is used for steam and domestic purposes. A considerable tonnage moves to the Carolinas. This field has been increasing its output, and on account of the large undeveloped tonnage available, is likely to continue to do so.

Fields Nos. 17 and 18 are called the Tug River and Pocahontas fields, and are in the extreme Southern part of West Virginia, and in two of the adjoining counties in Virginia. The output in 1923 was 21,036,000 tons, from 194 mines, and in 1930 was 25,296,000 tons, from 131 mines. The coal from these fields is an extremely high grade of low volatile coal, and is sold as Smokeless coal in both the Eastern and Western Markets. It is used as a mixture for by-product coke making at nearly all coke plants which it can reach, and is sold as Smokeless coal throughout New England and throughout the Middle and Northwest, where smoke ordinances encourage its use.

A considerable tonnage of this coal is now used at coke plants and at the large power plants in and around New York. Much of it was used in 1920 for bunker use at Norfolk, but this use has been diminishing, on account of competition with oil. Some of this coal at various times has moved into the West Indies and South America, on export business. A large tonage is used in Ohio and along the Lakes (1253).

Fields Nos. 19 and 20, known as the Winding Gulf and New River Fields, are in the Southeastern part of West Virginia, along the Guyandotte and New Rivers. The output in 1923 was 16,038,000 tons, from 223 mines, and in [fol. 815] 1930 was 23,947,000 tons, from 166 mines. The coal here ranges from a low volatile to a medium volatile coal. The seams are very low in ash and are used for metallurgical, domestic and steam purposes. The general distribution is the same as that of the coal from the Tug River and Pocahontas Fields.

By Judge Northcott:

Q. Is not that the first field you have mentioned, where the production has increased since 1923?

A. In both the Tug River and Pocahontas, and in the New River and Winding Gulf, it has increased—in those four fields.

Q. What is that?

A. Some of the witnesses testified here yesterday that that is a better grade of coal than some other coals.

Q. I am asking your opinion as to why these two fields are the exception, up to now, as to the increase in production, and increase in the number of mines?

A. There is a decrease in the number of mines in both Tug River and Pocahontas. The number of mines has decreased from 194 to 131; and in the New River-Winding Gulf, from 223 to 166. The number of mines has decreased, while the tonnage has increased.

Q. That shows a tendency to run to the larger operations? (1254).

A. Yes, in those fields.

By Mr. O'Brian:

I think the real reason for that increase, is the fact that coal has a broader market than any other. It is used for practically every purpose for which any coal can be used, and its use has been growing very rapidly in Chicago, Cleveland, Detroit and all those cities where they are insisting [fol. 816] on smokeless fuel, smoke ordinances, and things of that sort.

By Mr. Donovan:

Transportation facilities have had something to do with the increase in production in these fields.

They have probably the best transportation facilities of any coal fields in the country. They move both East and West, on good differentials, and the coal is used for a great variety of purposes, more than any other coal (1255).

By Judge Northcott:

In the matter of freight rates the Tug River, Pocahontas, New River and Winding Gulf Fields have an advantage over the Kenova-Thacker Fields of 10 cents a ton going East and going West the difference is the other way. As to transportation facilities I do not think that these four fields have really any advantage over the Kenova-Thacker Fields but they do have over other competing territories, that is, other fields (1256).

By Mr. Donovan:

Prior to 1923 transportation was limited in almost all coal fields by a shortage of cars and inability of railroads to handle the business that was offered to them generally.

Fields 21 and 22 were known as the Kanawha and Coal River fields, on the Kanawha and Coal rivers in southern West Virginia. The output in 1923 was 14,138,000 tons, from 314 mines, and in 1930 was 17,139,000 tons, from 121 mines.

The coals from this territory are all high volatile coals, of excellent quality, and are sold for all kinds of metallurgical, gas, steam and domestic purposes.

A large tonnage from this field moves to the coke plants in and around New York, and into Montreal, and many of [fol. 817] the western coke plants, and for gas purposes they are distributed all over the United States from Florida to New England on the Atlantic coast, and as far west as Iowa.

The domestic coals are sold mainly throughout the central and northwestern states. A very large tonnage of the (1257) coal from these fileds moves to the head of the lakes, for metallurgical and steam purposes.

Field No. 23, known as the Logan Field, is almost entirely in Logan County, West Virginia, on the Guyandotte River. Its output for 1923 was 12,831,000 tons, from 155 mines; and for 1930 was 16,806,000 tons, from 74 mines.

The field has been growing rapidly and ships a variety of coals mainly used for industrial and domestic purposes. Only a small percentage of the coal from this County is suitable for metallurgical purposes, but all of it is a very excellent steam and domestic coal, and it has been used largely in the past in New England for fuel purposes, and throughout the middle west, northwest and the head of the Lakes for steam and domestic coals.

A large tonnage from both Kanawha and Logan fields moves into the Carolinas.

Field No. 24 covers the coal and coke in Preston County and Taylor County, being the Junior-Phillippi and Gauley fields in Central West Virginia. The output in 1923 was 9,235,000 tons, from 273 mines; and in 1930 was 6,260,000 tons, from 115 mines.

The most of this coal is from a medium to a high volatile bituminous coal and is used largely for steam and domestic

purposes. The importance of this field has been decreasing largely on account of competitive reasons.

Fields Nos. 25 and 26 are known as the Southwestern Virginia and the Clinch Valley fields, and are in the extreme southwestern part of Virginia. In 1923 the production was 10,612,000 tons, from 157 mines; and in 1930, was [fol. 818] 9,088,000 (1258) tons, from 74 mines.

The coals here are all high volatile and of a high quality, and have been shipped to by-products and gas plants through New England and the northwest, and in addition to this are largely used for steam and domestic purposes. A considerable tonnage of coal from this territory moves into the Carolinas and Georgia.

Field No. 27, called Upper New River, in Virginia, is a small field in some of the so-called anthracite seams. The output in 1923 was 217,000 tons, from 8 mines, and in 1930 was 239,000 tons, from 9 mines. The coal is domestic and steam, and this field has no commercial importance.

Field No. 28, the Richmond Field, in Virginia, is near Richmond. The output from it is practically nothing, and it has no commercial importance at all.

Fields Nos. 29, 30, 31, 32, 33 and 34 are the Massillon, Coshocton, Cambridge, Crooksville, Hocking and Jackson fields in Ohio. The production in 1923 was 19,911,000 tons, from 690 mines; and in 1930 was 10,537,000 tons, from 445 mines.

The most of this coal is used for steam and domestic purposes in the state of Ohio, although a portion of it is shipped to Canada for railroad fuel, and a considerable tonnage is shipped to the head of the Lakes for distribution there as railroad fuel. A considerable amount of this coal is also used to fuel boats on the Lakes.

Field No. 36 is the Northeast Kentucky field, otherwise known as the Elkhorn and Paintsville Section. The production in 1923 was 9,602,000 tons, from 225 mines; and in 1930 (1259) was 12,032,000 tons from 105 mines.

The coals in this field are of the very highest quality gas and coking and domestic coals. They are shipped to various coke plants in the north and northwest for gas and by-[fol. 819] product purposes, and the domestic coal is sold mainly through the central west and the northwest, a large tonnage of it going by way of the Lakes.

Field No. 37 is the Hazard field in Perry County, Kentucky. The output in 1923 was 6,660,000 tons, from 128 mines; and in 1930 was 6,588,000 tons, from 70 mines.

The coal is sold almost exclusively for steam and domestic purposes, although a little of it is used for metallurgical purposes. The market is mainly through the territory north and northwest of Kentucky.

Field No. 38 is the Harlan field, in Harlan County, Kentucky. Its output in 1923 was 8,752,000 tons, from 75 mines; and in 1930 was 13,051,000 tons, from 58 mines.

This field supplies some of the very highest quality gas and by-product, metallurgical and domestic coals in the country. A considerable portion of its output is shipped into the Carolinas, Georgia, and Tennessee, but the most of it moves to the north and northwest, a great deal of it being consumed in by-product coke plants in the Chicago section. The domestic coals go as far west as the Dakotas and Minnesota.

Fields No. 39 is the Southern Appalachian field in southern Kentucky, northeastern Tennessee, and extreme southwestern Virginia. The output in 1923 was 6,765,000 tons, from 221 mines; and in 1930 was 5,946,000 tons, from 96 mines.

Coals here are all of very high quality for domestic and (1260) steam purposes. They are shipped largely to the south and southeast, but a considerable tonnage goes to the north and northwest. (1261)

Field No. 41 is the Western Kentucky field, in the western part of the State, which is a fair grade of high volatile coal. Its output in 1923 was 10,890,000 tons, from 172 mines, and in 1930 was 10,915,000 tons, from 134 mines. It is used [fol. 820] almost exclusively for steam and domestic purposes, much of it going south to Tennessee and to points tributary to the lower Mississippi River, but a considerable portion of it moves by rail into Illinois, Missouri and Iowa.

Fields Nos. 42 and 43 are known as the Rockwood and the Fentress Fields in Tennessee. Their output in 1923 was 3,104,000 tons, from 102 mines, and in 1930 was 2,535,000 tons, from 39 mines. These coals are used almost entirely for steam and domestic purposes in Tennessee and points south and to points along the Mississippi River.

Fields Nos. 44, 45 and 46 are the Big Seam Group, Cahaba and the Pratt Felds in Alabama. The output in 1923

was 20,496,000 tons, from 291 mines, and in 1930 was 15,578,000 (1269) tons, from 197 mines. These are high volatile coals, and are largely used in that State, partly for metallurgical purposes in the steel mills, and for steam and domestic purposes; some of it is shipped to Florida and Mobile for bunker purposes, although this has largely been superseded by oil, and some of it is shipped to New Orleans for domestic purposes and use of vessels there. Much of it is used in Georgia and Mississippi. Some of this coal in the shape of coke moves on favorable freight rates as far north as Chicago.

Fields Nos. 47 and 48 are the Indiana and Brazil Block fields in the State of Indiana. The output in 1923 was 26,138,000 tons, from 301 mines, and in 1930, was 16,490,000 tons, from 167 mines. These coals are used entirely for steam and domestic purposes, mainly in that State and in Illinois.

Fields Nos. 49, 50, 51, 52, 53, 54 and 55 are the fields in Illinois. In 1923, the output was 79,252,000 tons, from 575 mines, and in 1930, was 53,731,000 tons, from 508 mines. These coals are a medium grade of high volatile coal. A very small percentage of the total from the southern part of the State is used for metallurgical purposes. The rest [fol. 821] is all used for steam and domestic purposes. Most of it is used in the State, but a considerable portion goes to St. Louis and to Missouri, Iowa, Michigan and Wisconsin points. By far the larger part of the output of this State is consumed by the railroads and central power plants in the State.

Field No. 58 is a small area in Michigan, in which the output in 1923 was 1,172,000 tons, from 13 mines, and in 1930, was 661,000 tons from 6 mines. The coal is all used in the (1270) State for steam and industrial purposes, and is of little significance.

The only remaining field east of the Mississippi River is what is called Field No. 92, or the Deep River Coal Field in North Carolina. It has a small tonnage at the present time, but there has been a considerable tonnage of coal developed by drilling in that vicinity, which can be opened at a trifling expense, and I happen to know of some developments which will very likely increase the output of that field to a magnitude of three or four hundred thousand tons in the near future, and it is possible that that

may be considerably exceeded. The field itself is of high volatile, medium grade, but it has a tremendous freight advantage (1271).

The foregoing statement covers the entire territory East of the Mississippi River.

Whereupon the defendants offered in evidence a table showing the number of by-product coke oven plants in the United States. This table was received in evidence and marked Defendants' Exhibit 32 (1276).

(1272) I prepared this table. This table is based on the list of plants, with the number of ovens in each one, in each [fol. 822] State of the Union. It is taken from the Keystone Coal Buyers Catalogue for 1932.

A somewhat similar statement is given in the publications of the United States Bureau of Mines, in their publication on Coke each year. But that list was not available when this statement was made.

The table of tonnages is given for 1929, and is taken from the United States Bureau of Mines, Coke, in 1929.

I have shown in this table, in the first column, the states in which the plants are located.

I have shown in the second column the total number of plants, and number of ovens in each state.

Next, I show the number of the plants, with the number of ovens having their own captive coal plants, or captive supply.

That is taken from my own personal information.

Third, is shown the difference between the two, and shows the number of plants, and the number of ovens having no captive supply.

The top portion of the table, comprising the States from Minnesota to Tennessee, shows a list of the plants at the ovens in the territory which can be and is being reached by coals from the Appalachian district. This shows that in this total area there are 73 plants, with 7,599 ovens; of that number, 41 plants, with a total of 5,867 ovens, have their own coal supply. Leaving 32 plants, or 1,692 ovens, to be supplied from the commercial markets.

The total consumption of these plants in 1929 was 45, 101,931 tons of coal. Of this number, 56.1 per cent of the (1272) plants had their own captive coal supply, or 77.6 per cent of the ovens.

By Judge Soper:

The purpose of this exhibit, I think, is this, that the idea was brought out by the Government that they must have [fol. 823] Appalachian coal to make pig iron. This table shows that, of the plants that must have it, over three-fourths already have their own coal supply. So, no matter what happens to us, whether Appalachian Coals, Incorporated, goes on or not, it cannot affect them (1273).

By Mr. O'Brian:

Q. I thought this was as to coke ovens?
A. Yes, by-product coke ovens.
Q. But you just said pig iron?
A. I know, but pig iron is used almost entirely—or rather, I should have said, that coke is used almost entirely in the blast furnace industry. Coke, you understand, is used in the making of pig iron. There are a few that are used for domestic ovens (1272).

By Judge Soper:

"By-product ovens" is a term that is used to distinguish a plant in which coke is made in which all available (1273) by-products, from the coal in the making of the coke, that is, tar, ammonium sulphate, gas, and everything else, is saved (1273).

By Mr. Donovan:

From the inception of the coke business in the United States, which was in the early 70's, I think 1871 or 1872 perhaps, coke was first burned out on an open pile on the ground, like you see lime in the fields. Later, they built beehive ovens, which was a hemispherical brick oven, in which the coal was charged at the top. It was then leveled off so that it had about an average depth. The coke, when made, was drawn, so to speak, through an opening in the side, representing a door (1273).
[fol. 824] This was all done at the mines, or practically so, because then there was nothing saved except the coke.

By Judge Soper:

The difference between coke and coal is that coke is everything in the coal except fixed carbon, and the ash has been driven off (1274).

Substantially all of these coke ovens were at the mines. Some few were not.

They were in relatively small units, and were built at the mines, because nobody in those days ever thought of mixing coals. It happened that the coke industry was started in the Connellsville region, close to the Pittsburgh section, where the big iron section was at that time. I have not the exact figures in mind, but certainly over 80% of coke is used in the steel industry. There is a little used for smelting other kinds of iron and now quite a portion of the coke is used for domestic fuel, taking the place of anthracite. This coke is as nearly pure carbon as they can get (1274).

By Mr. Donovan:

The beehive coke oven is no longer in general use. They have gone, practically, I think, 85 per cent or thereabouts to the by-product oven, and the beehive oven is substantially only used in time of a big boom, to take care of the big demand. It cannot compete at all with the other type of oven (1275).

The by-product oven is built almost entirely at the plant where the product is used. In the case of by-product ovens, everything that can be gotten out of the coal is saved. In addition to that, they usually get a better percentage of coke. That is, the yield of coke from the coal is better in the case of the by-product oven, than in the case of the beehive oven.

[fol. 825] In the other portion of the country, where Appalachian coals ordinarily cannot reach, there is a total of 40 plants, containing 5,523 ovens, of which 27 plants, having 5,441 ovens, have their own supply of coal, and the [fol. 826] remainder have not. Those plants used a total in 1929 of 31,656,919 tons, and 90 per cent of the plants in this territory, and 98½ per cent of the ovens, had their own supply. Of the total of 103 plants, or 13,082 ovens, 58 plants or 11,308 ovens, which equalled 66 per cent of the plants and 86.4 per cent of the ovens, had their own captive supply.

By Judge Soper:

Part of this captive supply was Appalachian coal. In the territory where Appalachian was shipped, there were

45,000,000 tons used in 1929, and 41,656,919 tons in the other portion. We do not supply all that coal, by any manner of means. Roughly 60 per cent of the coal used in by-product ovens is used in territory (1276) where Appalachian coals can compete. And the other 40 per cent in places where we cannot compete, on account of freight rates or distances.

Whereupon the defendants offered in evidence a statement showing shipments of bituminous coal for the calendar year 1929 to all destinations in the Lower Peninsula of Michigan, the total shipments of defendants to that territory and the percentage the shipments of defendants bear to the total. This statement was received in evidence and marked Defendants' Exhibit 33 (1358).

(1278) The basis for this statement is figures given in Defendants' Exhibit No. 2 and the Government's Exhibit No. 2 showing the total receipts in the lower peninsula of Michigan from all sources of Appalachian coal in 1929, and the total receipts in that same territory and the same period from the defendants, and the percentage of the total of the coal that this bears. In other words, during that [fol. 827] year there were received from—the Exhibit shows there were received from the Appalachian territory 19,417,561 tons, of which 6,287,701 tons, or 32.38 per cent, came from the mines of the defendants.

Whereupon the defendants offered in evidence a statement showing shipments of bituminous coal for the calendar year 1929 to all destinations in the State of Indiana (except destinations included in the Chicago rate district); the total of shipments to the Indiana territory from all producers in the territory covered by Appalachian Coals, Inc. and the total shipments to the same destinations made by defendant companies, also the percentage relation of defendants' shipments to the Indiana total and to the total shipments to Indiana from the Appalachian Coals, Inc., territory. This statement was received in evidence and marked Defendants' Exhibit 34 (1359).

Whereupon defendants offered in evidence a statement showing shipments of bituminous coal for the calendar year 1929 to all destinations in the State of Ohio; the total of shipments to Ohio destinations from all producers in the

territory covered by Appalachian Coals, Inc., and the total shipments to the same destinations made by defendant companies; also the percentage relation of defendants' shipments to the Ohio destinations and to the total shipments to Ohio from the Appalachian Coals, Inc. territory. This statement was received in evidence and marked Defendants' Exhibit 35 (1359).

We hope and expect that Appalachian Coals, Inc., will be able to sell more coal from our general territory than we have been able to do. In that case, of course, we will be [fol. 828] able to run the mines better and with more time than we have been able to do so far (1283). My own opinion is that if we are not able to do this, the contacts that we have made through this movement will lead to the consolidation of various mines in the territories having the same grade of coal, which will enable some of them to be closed down, and much better running time to be given to those others, so that the ultimate effect on labor should be very beneficial.

In my opinion if Appalachian Coals, Inc., is not put in active operation there will be a further shut down of mines.

Cross-examination.

By Mr. O'Brian:

It is my hope and expectation that Appalachian Coals, Inc., will be able to sell more coal for its members (1284) than they have sold heretofore. It is my personal opinion that if that expectation is not realized certain of the properties in this territory will be consolidated or merged and certain mines closed down. This would not throw labor out of employment but would give labor more employment at those mines that were running. The labor would shift over into those mines that were running. Time alone will tell whether the consolidation movement will be substantial. It may not develop at all. If Appalachian Coals, Inc., does not succeed in selling more coal for its members, the inevitable result will be that some of the mines now in operation will be shut down and the properties consolidated (1285).

In connection with Defendants' Exhibit 31 the estimate was made by vice-president Harper, of the People's Gas,

Light & Coke Company of Chicago. He read a paper containing those figures and I presume he either made it himself or it was done under his direction. This exhibit does [fol. 829] not show the basic figures from which these estimates are derived; they were undoubtedly the published figures of the Bureau of Mines. It is an estimate based on the rate of increase shown by bituminous coal from 1900 to 1915, if competition with the available supply of other kinds of energy sources had not existed. That is to say, whoever made this exhibit, made it taking the rate at which bituminous coal production had been increasing in those 15 years, and taking that as a basis, he figured out that if that rate of increase had continued, year by year, to 1930, its total production would have been (1287) 680,000,000 tons, if there had been no competition to stop it.

By Judge Soper:

Q. The difficulty I think with that assumption is this, that in the initial period, the beginning of the period, there was such competition.

A. Yes.

By Judge Soper:

Q. And it was to be assumed, of course, that there would still be some competition. The figures which you have here, the final figures, are on the basis that there would have been no substitutes for coal used at any time. In other words, this 680 million tons is the amount of coal that would have been used if there had not been any other sources of supply of energy.

A. That is true, I think, your Honor.

Q. But at the beginning of the period, there were in existence these sources of supply, so that if you had stopped to think, at the beginning of this period, you would have had no right to assume that all other sources of supply were going to cease to exist, and therefore coal would furnish all the energy.

[fol. 830] A. No; I was wrong in that statement. As I read this, and as I understood him to say, this is based—the way it reads is this:

(1288) "Based upon the assumption that bituminous coal would have maintained its upward trend in percentage of the entire energy supply of the United States."

In other words, he took the percentage that it had in 1915, and projected the ratio from 1900 to 1915, forward to 1930. In other words, as I understand this—and I think it is correct—he had allowed for the use of substitutes prior to 1915, and he only showed the increase that would have taken place from 1915 on.

Q. But you told us before when we were discussing this—at least, the impression was made on my mind; I would not be brave enough to say that I understood it, exactly—that this 680 million represented all the energy produced from all sources at the end of the period.

A. I think I did make that statement, your Honor, but I think it was incorrect. I think clearly he means, and I think, as I recall his statement at the time, he means that they assumed that the relative proportion of the energy of 1915 that was furnished by bituminous coal, after allowing for the other factors, was projected on, and from 1915 to 1930, is covered in this table, I think that is it.

By Mr. O'Brian:

Any statement of this kind must necessarily be an estimate. There are no available figures to show the total plants that substituted one power for another.

The figures in the second column, representing percentages of replacement, do not represent the percentages of [fol. 831] total energy other than coal. They only represent the increase in that amount over what was used at the beginning of the period. (1290) They do not represent the total substitutes for coal used in 1930.

Referring to Defendants' Exhibit 32 it covers territory that can be reached by Appalachian Coals, Inc., but the Exhibit does not contain any breakdown showing the amount of coal shipped into any of these states to coke ovens from the Appalachian region. Such figures are not available. I know that coal has been, and is now being, shipped into the New York harbor to a plant in Brooklyn from the Appalachian region. (1291) There have been at times, but I do not think now, very substantial tonnages of coal from the Appalachian region going into Buffalo. I know personally that Appalachian coals have been shipped into each of the states named on that table and I also know that Appalachian coals can be shipped into each of these states. (1291) In every year I would say that coal from the

Appalachian region has been shipped into each of these states in substantial quantities. The only information that I know of to support this statement is published in Mineral Resources published in 1932 by the Bureau of Mines in which is given the table showing the coal (1292) used in the manufacture of by-product coke by state where produced, and showing the state where consumed, in net tons. Those figures of the Bureau of Mines do not show what district, other than the State, coal came from.

I would say that my personal opinion is that we would be fortunate in the bituminous coal industry if we shipped more than 450 million tons of coal per year at any time in the next ten years. My point is that we are actually experi- [fol. 832] encing a fuel decrease in the use of coal and that there is no reason to expect anything else for the next period that we can foresee. With the various economies and the other matters that I have shown which have not yet reached their culmination by a great deal I feel that this is true.

(1295) I tried to say this morning that we were actually experiencing a fuel decrease in the use of coal, and that there was no reason to expect anything else for the next period that we can forsee. In 1929 the production was 543,988,000 tons. The production in 1927 was only 17,000,000 tons less than the 1929 production and the 1925 production only 14,000,000 tons less. The production in 1918, in 1920, in 1923, and in 1926 was larger than in 1929.

It is true that a part of that decrease in the use of coal began with the first part of 1930 and has been progressively due to the progressive paralysis of industry. But I was not talking about that particular feature. I was trying to point out that with the various economies, and everything that we have shown had taken place, and which have not yet reached their culmination by a great deal, that is the situation. In the fuel oil situation along the Seaboard generally, the price of oil delivered is approximately the equivalent, that is I mean, the amount of oil that would be the equivalent to a ton of coal, is delivered at a cost which is within a few cents either above or below the freight rate on the coal that it replaced.

(1297) Referring to Defendants' Exhibit 28 I have been unable to prepare a study of the current prices for these substitute fuels in the years for which their use is

shown in this table. No such data is available. A very fair way to determine the degree of competition between these various forms of fuel would be to show what the prices were on a comparable basis. Data for that purpose were not available. In Defendants' Exhibit 28 the column showing domestic oil, (total crude, including that refined) and [fol. 833] also imported oil, with the same legend, includes gasoline and I have already stated that gasoline was not a competitor of coal for fuel. Only the fuel and gas oils were direct competitors of coal. To determine accurately then the degree of competition between these fuels and coal, using this exhibit, some allowance would have to be made in both of these (1298) columns for that percentage of the production that was gasoline and not oil fuel.

I commended the book entitled "The Competitive Position of Coal in the United States" as an illuminating study. I do not agree with the statement in this book that "Competition of fuel oil has probably reached a stabilized level and further inroads, except in restricted localities, are not expected". As to the statement in the same book that "A loss of market to natural gas to an extent of possibly 20,000,000 tons is probable, but this competition will affect the western interior and Rocky Mountain coal fields to a greater extent than the fields east of the Mississippi River", I would agree with that statement as far as the locality is concerned. The book was published in 1931. (1299) The gas fields that I spoke of in Northern Pennsylvania have been discovered and developed since the book was written. That was an entirely new thing that was not thought of in those times. The great pipe-lines into Chicago, Cincinnati and St. Louis were in at that time but I do not think the lines were completed into Indianapolis and that territory. My only disagreement with this statement is that it does not make allowance for the discovery of natural gas in the northern portion of central Pennsylvania. A pipeline is either building or completed into the outskirts of New York City from this Pennsylvania field and this gas has already gone into Syracuse and Rochester. (1300) I do not know the output of these new gas fields. [fol. 834] There has been very little published about them. I do know that the pipeline into New York is supposed to have a capacity of somewhere in the neighborhood of 150 million cubic feet of gas a day.

Q. And do you agree with this statement: "On the whole the indications are that the coal industry may look forward to a stationary consumption for several years in the future"? I take it you do not?

A. Well, I hope not.

In discussing the competition of oil and gas that would come in if the price of coal became too high I did not mean that gas would come into every little town and village in that whole territory. As a matter of fact it now covers substantially all of the larger places in Ohio, Indiana, a great many of them in Illinois. There are two new gas and oil fields that have been developed in Michigan, one on each side of the lower peninsula within the last year or year and a half, and it would probably not get to such a great extent into Wisconsin or perhaps into Minnesota. Ohio has had natural gas for a great many years. (1301) Michigan has had comparatively little natural gas. I cannot tell you the capacity of the natural gas fields in Michigan. No accurate statistics have been published on them yet. I do not know whether they know themselves how much they have.

At this point the witness indicated on the map, Defendants' Exhibit 9, the locations of these gas fields in Michigan.

In the interior, in the States of Georgia, South Carolina and North Carolina, the consumption of fuel oil would be inconsiderable in tonnage, excepting that everywhere you go you can find fuel oil burners in houses all over the United States. Of course, the tonnage that they use is comparatively small.

[fol. 835] With respect to butane and pentane gas as a factor in competition at the present time, it is not used a great deal. There are three or four places where it is used and the use of it is being promoted. Nothing is negligible that takes away our business, no matter how small it is. Measured in hundreds of thousands of tons, or anything of that kind, it has not yet displaced any substantial volume of bituminous coal.

With respect to the Chilean ore and the other ore in connection with which it was found by the steel men that they could use a different coal than they had been using previously, the coal used with this ore would be probably two

or three per cent of all the coal used in the by-product ovens (1303).

Ohio coal, as compared with coal from the Appalachian region, is generally of a higher sulphur and ash content. It has also a little higher moisture although that is not a particularly big factor there. It is further west. But it is regarded generally as a slightly inferior coal for some purposes (1304). The Illinois and Indiana coals, particularly the Illinois coals, are of a considerably higher moisture content than the Appalachian Coals so that on an even price and on a heat unit basis the coal is inferior to Appalachian coal.

The high sulphur content of certain coals may damage the grates a little more than ordinary coal would and that is one of the disadvantages of high sulphur coal. It, so to speak, smelts the grates of the furnace. It tends to clinker and cover over the grates and it may possibly destroy them after a while. That is one of the standing objections on the part of the firing engineers to high sulphur coal.

[fol. 836] As to the question which of these markets that I have described as competitive markets is the least competitive with respect to Appalachian coals, I do not believe I can answer that question. (1305) I do not think there is any difference in the amount of competition in any of them. It is all just as keen as it can possibly be. What I mean is that 2 or 3 competitors can give you just as much competition as 50. So, while we may have less competitors, we have just as strong and keen competition. That is one of my reasons for saying that in my opinion the organization of the Appalachian agency will have no effect whatever upon price. If each of the eleven great producing districts that have been described here were organized into selling agencies similar to Appalachian Coals, Incorporated, that would have no effect upon the market price. (1306) I do not think that the degree of organization would have a tendency to lift the price.

Speaking generally, I do not think it is possible to make a price that will stick, if all the coal in the United States were in one hand, for more than just a few months, or in a very small territory. I do not think that Appalachian Coals, Inc., alone could in a small territory for a short length of time increase the price and hold such increase.

(1307) Assuming that a plant in Canton, N. C., a very large plant which is a large consumer of coal, is purchasing all that coal from these defendants in competition with each other, it is my opinion that Appalachian Coals, Inc., would not be able to raise the price of coal to that plant for any length of time at all. The reason I say this is that other non-defendant Appalachian coal operators would come in. In the first place they would be there when Appalachian Coals, Inc., asked for an increase in price and the other [fol. 837] coal would come in. And other coal would come in, provided the freight rate would let it in.

Q. Assume that these 11 sales agencies are organized (1309) within each of the producing districts, 74% of the coal is tied up in a similar arrangement into its own sales agency, do you think that the elimination of price competition between the operators producing that 74% of coal, would have no effect whatever on the market price of coal?

A. We expect to have competition between operators in the Appalachian region, and I do not accept the condition you name, which is a very violent assumption for a coal man to make, or at least to agree to; that it would be able to maintain any set price. (1310) It is my idea that an organization such as Appalachian Coals, Inc., could build a plant in Asheville, N. C., for example, for the pulverizing of coal. They would have the ability to take care of a situation of that kind, and promote the sale of our coal in so doing. I do not think under our organization we would have any idea of doing it, but we might very easily do it. I do not think that Appalachian Coals, Inc., under its charter could do anything of the kind.

[fol. 838] would develop that proposition, a thing of that kind could be effected, and they would certainly be in a much better position (1310) to get it done than any outside company would be.

By Judge Parker:

In my opinion the organization of Appalachian Coals, Inc. would have some effect in stabilizing the market price of coal.

We will, or we expect that the prices that are fixed by this sales agency are not going to be the same for the different grades of coal. In other words, a purchaser will have the option of buying one type of coal at one price, for instance, a low ash coal. If he wants a very high grade low ash coal he can buy that at one price. And then if he wants the output of some seam of a higher ash content he can get that at a higher price. And the same way with other different seams and different grades of coal. We will still have competition between the members of the Appalachian Coals, Inc., but it (1312) will be a competition more of quality than of price. I think in that way we will be able to stabilize the situation to some extent.

It would be my thought that in that case, in the case of competition now, everybody goes out, and they take any order they can at any price. In that way we would know that a mine with an identical quality of coal would get the same price. If our coal was a little bit better or a little bit worse than the other man's we would have to make a different price for that. And that competition then would be between our sales agent in the line of preparation, or better service, or something of that sort, instead of just going out and taking an order for coal regardless of whether that type of coal was best fitted for that particular place or not.

[fol. 839] By Mr. O'Brian:

I would not say that under existing conditions these defendants go out and offer coal at any price that they think they can get. They offer coal at a price they want to get.

(1313) I speak of that as competition. In this sales agency arrangement the price at which the particular grade is to be sold is fixed by the sales agency in competition with all of the other coals that are in that district from outside. I do not think you have the idea that we can just say, for instance, "We are going to go out and fix the price at $1.50 a ton for our coal" if the outsiders are getting $1.25.

I think competition will remain as between these defendants. There is no competition as to price but there will be competition as to quality. Based on quality and service rather than on a mere price. The selling agency can pro rate orders only for the same quality of coal (1314).

These coals will all be classified. Certain very high grade coals will bring one price and coals of another quality will bring another price. And the price will be fixed, of course, by the price that we have to meet in competition. That price is not going to be stable. It will fluctuate every day, or maybe every hour of the day, as between our sales agency and outside competition.

Today the price paid for coal in the competitive market is fixed by competition between the defendants and between each defendant and the rest of the sellers of coal of all sorts and the purchaser gets the benefit of the low price that will result.

[fol. 840] (1315) No, it is not true that after this agency is formed the defendants will cease to compete as to price because no matter to which defendant my order is prorated by the sales agency the same price would be charged me for it. The same price will be charged for the same quality of coal.

That situation will be different from the existing situation in that so far as these defendants are concerned they have surrendered their power to fix the price for that coal to the sales agency, and the sales agent will then fix the price in competition with the non-defendant competitors.

By Judge Soper: We have had an illustration here by a great many witnesses of an incident, perhaps an important incident in the coal industry, which you have not mentioned, and I am not trying to saddle you with any of their conclusions. I refer to distress coal. And we have been given to understand by a considerable number of witnesses here that one of the benefits of the new organization will be a reduction in that matter, so that there will be less of this ruinous competition of coal being sold for less than it costs to produce. And we have been told that that is going to have a beneficial effect on the sales price to be gotten by the output of these Appalachian mines. Now it is assumed, and we must assume in that connection, that there is going to be a lot of distress coal left on the market nevertheless. And you are going to have distress coal from the independents who won't come in?

A. Surely.

Q. And if these other districts do not organize like this district has organized—and you seem to be somewhat

[fol. 841] doubtful whether they are going to be organized —you are going to have distress coal in those districts. So that there is going to be a considerable volume of distress coal on the market. Everybody must admit that. And yet these gentlemen say that the elimination of that part of the distress coal which now emanates from the defendants is going to benefit the situation.

Now if that is true—and we have been told that it is true—what I am getting at is: If the elimination of that (1317) comparatively small part of distress coal that comes from these defendants is going to help the situation and affect prices I do not see why it is that you do not feel that the elimination of competition between 74 per cent of the producers of other grades of coal and distress coal is not going to have some effect on the price of coal. Why is it that the elimination of distress coal, of a small percentage of distress coal, is going to help the industry by maintaining prices or influencing prices, and yet the elimination of competition between 74 per cent of all the coal in the Appalachian coal is not going to have any effect on prices?

A. Well, your Honor, I hardly know how to explain that. The distress coal that has been spoken about has a weight in the market that is many times its tonnage. In other words, one of the witnesses testified the other day that he had shipped 20,000 tons to New York at one time. And he had been told that there were 100,00 or 200,000 tons of that coal. Each one of the ten men had multiplied the 20,000 by that.

Q. Yes.

A. That is one of the reasons. Now I can not see personally how the control of 74 per cent of the tonnage will enable us to raise the price and keep it there.

[fol. 842] Q. Well, I am not saying that it is going to do that.

A. Even if we wanted to.

Q. But take this very illustration that you give. It is one that I had subconsciously when I framed the question, or tried to frame it. I will admit that it was a very involved question. But if this little tonnage that this (1318) gentleman spoke about would upset the whole market in New York City on the kind of coal that he was going to sell, why is it that the 74 per cent of the control in the Appalachian region is not going to have any effect on the market? You have

got here, for instance, a very profitable mine conducted in part by Mr. Francis. He says he does not do the whole work, but he has part of it. I forget the name of it. I will call it the Francis mine. And then you have got another mine that seems to be a very sad sort of a proposition, called the Red Jacket mine. Now suppose that those two gentlemen are competing for this Canton man's business, and the Red Jacket man says, "I am going to get rid of my coal, and I am going to sell it." Isn't that going to knock down the price of Mr. Francis' product if he is trying to sell to the Canton man?

A. Mr. Francis, I imagine from the results, would simply not quote against that proposition in that case.

Q. Well, maybe not, but then he would not quote against distress coal either. But you say that affects the market. If Mr. Red Jacket comes in there and knocks the price to the Canton man why isn't it going to affect the whole market for all the Appalachian people?

A. Well, Judge, in quoting usually on the—as I say, I am not an authority on distress coal—I might bring out one point in that that I do not think was perhaps explained [fol. 843] clearly. The only people that can buy distress coal of any consequence are the men that have the ability to store it. In other words, they buy it not because they want it at the moment as a general thing, but because it is offered at an (1319) abnormally low price, and they take it.

Q. And there are not a great many of those people?

A. And there are not a great many of those people, you see (1320).

For instance, take a utility company. I happen to know of one where they have a big storage. I think it runs in the neighborhood of a couple of hundred thousand tons. They have one mine of their own, and mine perhaps 300,000 tons a year. I think that is about the quantity. They may buy some on contract from other people outside, and they buy the balance of it on the spot market. In other words, if you had 20 cars of distress coal, you would go to that buyer and say, "Now, I have 20 cars here of slack. Will you take it off my hands?" He says, "I don't need it. I have all the coal I want, but if 25 cents a ton will move it, I will take it."

In the case of the ordinary manufacturer—for example, I doubt if this man at Canton could take care of any coal of that kind. That is coal that must be moved right now.

Q. What conclusions do you draw from the fact that it is only in rare instances that you can find a man who can buy distress coal?

A. It does not normally figure in competing for a contract over a period of time, as a general proposition.

Q. Then, I draw the conclusion from that, that distress coal is not a very big factor in the coal proposition?

A. It is quite a factor in the market, because, as I say, the effect is multiplied many times.

[fol. 844] Q. If there are only a very small number of people, or if there is only a very small percentage of people who can buy it, are you not exaggerating the effect of it? In other words, may I not conclude fairly from your statement that it is not a very big factor in affecting the price, because you say there are very few people who can afford to buy it and store it?

(1321) A. Your Honor, I would have to say in response to that, that I have not made many prices. It is up to our sales agent. He practically handles it, and I think he could explain that far better than I can.

Q. Let me abandon that, and make this other suggestion. I do not think, from my limited knowledge of this case, having read what happened in New York and having heard the testimony here, that it is an unfair hypothesis to ask you to assume that all these districts will be organized. One has been organized. Three or four have at least started with their incorporation, if I recollect correctly, although they have not gone into practical operation, and some of the rest are considering it. The leaders of this industry, men of influence and character, who have appeared before here, have advised the whole industry to do it, and have actually printed the plan and sent it out broadcast. If these gentlemen, who want to be law-abiding—everybody realizes that—and who are men of fine ability and standing in the community, have advised it and urged everybody to do it, I think we have a right to assume that it will be done. Consequently, it does seem to me that Mr. O'Brian's question was fair enough, when he asked you to assume that all these districts would be organized on a 74-per cent basis. Now, I ask you to do that, and I would like to have your view, as a man of wide experience, as to whether you think that will have any effect on prices. Note that I say "affect". I do not say "control", or "positive control". But I ask you

[fol. 845] whether you think that will have any effect on prices?

A. You mean permanent effect, Judge, or temporary?

Q. I will let you describe such effect as you think (1322) will take place, and you can characterize it as permanent, or temporary, or anything which your judgment dictates.

A. Assuming the condition which you describe, the very greatest effect that I can imagine it would have on the price situation would be that it might be raised temporarily, we will say, for a period of a few months at the outside. Just as soon as that price goes up to a point that is at all attractive, there will be excess capacity or capacity that is now idle, brought into the picture, and it will bring that price down immediately to where it was, or perhaps below.

Q. When you say "immediately," what do you mean?

A. As soon as the mines could get in operation, just as soon as it is attractive. There are so many mines that are now idle, and so many people anxious to open them up and get something out of it, that that excess coal would be brought into the market, and it would be absolutely impossible to maintain any price of that kind under those conditions.

Q. Let me abandon this price proposition. I want to get your view on another side of this thing. Let us assume that there is not any real influence on price, of a permanent character, so as to do the industry any good. That relegates us to the other advantages in this industry, and I understand them to be the educational advantages, to a large extent; that is to say, that people will be educated to believe that it is a good thing to use Appalachian coal?

A. Yes.

Q. Is that the main advantage? Let us eliminate the price consideration, for the moment. Is that the main advantage (1323) in the combination?

[fol. 846] A. That would be one advantage—the education through advertisements; but in addition to that, we would expect to educate more people to use coal. In other words, we would try to recover the markets that we have lost to gas and oil, and things of that sort. In addition to that, we would expect that we would have savings in the actual cost of selling coal.

Q. The latter, according to Mr. Francis, I think, is not likely to come immediately, and he was not quite certain when it would come, or that it would come.

A. Your Honor, none of these things is likely to occur immediately, I am sorry to say. It is a question of time, of course.

Q. The big immediate thing that you see is education?

A. Even that would not be immediate.

Q. And an increase in the use of coal?

A. Yes; that is what I want to do. We want to push our coals as much as possible.

Q. What I would like to know, is whether you would put the emphasis there, on the increase of coal generally, or the increase of Appalachian coal as contrasted with other coals?

A. Both. Primarily, we want to increase the use of Appalachian coal, as compared with other coal, and we expect this sales agent to make that its primary effort.

Q. How do you expect to accomplish that, if we assume, as I suppose we would assume, and have a right to assume, that other sales agencies would be organized in other territories? If you organize yours, and begin to preach Appalachian coal above all others, it is certainly going to be a big incentive (1324) for these other fellows to organize, and if you are going to send out your trained salesmen to tell people that Appalachian coal is the best in the world, [fol. 847] and the Smokeless people are going to send out their trained salesmen to tell people that smokeless coal is the best coal in the world, how are you any better off in the future than you are now?

A. We hope to get the jump on them, Judge, to some extent. The man who is in there first, usually retains a certain portion of the business he captures.

By Mr. Donovan:

We hope to get increased tonnage as a result of the organization of Appalachian Coals, Inc. and increased tonnage would reduce the cost. We would make our profit by a reduction in cost rather than by an increase in the price. Any increase in tonnage will reduce our mining costs very considerably.

By Judge Soper:

(1325) Q. I understood that. This was the only other thing I had in mind. So far as I can see, the Government is putting the emphasis, in this attack on your organization, upon the possible price control, or influence on price. Why would it not be perfectly easy to eliminate all question of illegality, if price control is not going to be effective, by getting up an educational organization, which would be contributed to by producers, according to the amount they produce? If education is the chief thing, why could you not organize an association, and all contribute to it, so much per ton of coal you produce, and educate the people to use your [fol. 848] coal? Why control the price among the industries, and link up what would be a perfectly legitimate enterprise with something which this case suggests is questionable in law—I do not mean in morals. There is nobody suggesting anything of that sort.

(1326) A. Well, the only answer I could make to that is this: That long experience in the coal business I think has taught everybody in connection with this matter at New York, that this was the only thing that had ever been suggested in which there was any unanimity of opinion in the business, could be done. All these other things have been tried at one time or another, and they have not worked. And this was the only plan offered at that meeting, which meeting was composed of the men of the greatest experience in the business in the country, that they were able to settle on as being anything that could be worked out at this time (1327).

By Judge Northcott:

With reference to the testimony given yesterday, that the smaller producer could produce at less cost than the larger producer (1328) my opinion is that if you take a small mine, where the man who owns it, let us say, runs it, and is his own superintendent, and is his own mine foreman, and he cuts down everything to the limit for the very small tonnage, that perhaps he could oft-imes mine coal cheaper than anybody else. But when you get above that stage the bigger the mine within reasonable limits, the cheaper is the cost of mining the coal. I mean that the very small producer will probably work for nothing and

will not charge up the proper overhead and the proper salary for himself.

I do not think in reality he is producing at a lower cost, [fol. 849] that is, that he is not figuring out these various costs. His actual net money cost may be cheaper, but he handles it differently and if it were handled in a proper manner it would probably be different.

By Judge Soper:

We have some of these very small producers in Appalachian Coals, Inc. (1329).

By Judge Northcott:

As a general thing I think it is true that the small producer can produce coal cheaper through these methods of bookkeeping, or lack of bookkeeping, and that he can throw it on the market at a lower cost. It affects the market in that way. But in reality he isn't getting what he ought to get for it if he gets a fair profit above a rightly figured cost of production.

I am acquainted with the financial gain or loss of a great many mines for the past ten years. Of these mines there were a good many that made some money after 1923. But if you narrow that down to the last two years I can not think of more than one-half dozen — are making money. The reason why they are making money is because they generally have some very much better condition, or something of that kind. Take the Island Creek Coal Company, for instance. They have much better conditions and they have always had excellent management. And there are some special conditions of that kind that affect those particular places (1330).

I will make the direct statement that in the large companies, that is, companies having over 2½ or 3 million tons of the high volatile fuels, that the only one whose accounts are listed on the stock exchange that is making any money is the Island Creek Coal Company. That is a matter of record and there is no question about that.

[fol. 850] That is partly because of its surroundings, partly management and partly investments. A large part of their returns are, of course, their investments in other resources besides the operation of the mines. Yes, I hope

that this sales agency is practical, that it will stand up in actual operation. There are a good many people who do not think so.

Q. In your opinion will it? I want you to think about the troubles that even the laymen with reference to the coal business can see; the probable situation that one operator will think he is not getting a fair share of the sales that have been made, and he becomes dissatisfied with the management, and thinks (1331) perhaps he could do the job better if he were managing it. With all the thousand and one things that will come up do you think this plan will work?

A. Well, it is difficult to say. I think there is a different feeling in the coal business now. I think there is more willingness to cooperate than there has been in the past. I will say that none of them have worked, and that is an answer to that question. But we hope with the feeling that there is now, that this can be made to work.

Q. I don't want to push you on the question.

A. Well, I want to be frank. I really do not know.

Q. But you hope it will work?

A. Yes; we hope so, and we are going to do our best to try to make it work. But I really could not answer that question.

Q. If it comes within the law you think you ought to have the opportunity to try to see if it will work?

A. That is it, absolutely.

[fol. 851] By Mr. Donovan:

I think competition would be fully as great as at present and a great deal more intelligent if eleven agencies in eleven different districts were organized each of which would be somewhat similar to Appalachian Coals, Inc. In other words, it would be a keener, fiercer competition than we have now, because the people who (1331) would be directing those companies would be the leaders in the business in each of their districts.

By Mr. O'Brian:

I remember the research made by Mr. Gandy, the Secretary of the National Coal Association and his report in the year 1930 on the subject of profits. I don't recall that he

reported that as a result of his investigation of the mines producing 200,000 tons or over 50 per cent of them made a profit in 1929 but if you have it there I expect it is correct. But it is only fair to say that Mr. Gandy did not include a great many companies. The fact of the matter is that, in my opinion, the National Coal Association did not have a majority of the companies at that time.

I remember that Dr. Willits made up some of the defendants' exhibits. It might have been Willitts' opinion, and undoubtedly was, and he would not misrepresent it, of course, that Mr. Gandy's selection of the companies was right. But I do not believe I saw how the figures came out.

(1333) Mr. Gandy was at that time Secretary of the National Coal Association and he reported as a result of his inquiries and said that more than 50 per cent of the companies reporting made a profit.

[fol. 852] By Mr. Donovan:

I do not know what percentage of the companies reported. I think it was a comparatively small percentage of the total companies that reported. My recollection is that it was under a quarter.

When Defendants' Exhibits 33, 34 and 35 were offered in evidence, it was agreed that counsel for the United States, after he had had an opportunity to examine them, might state his objections thereto, if any. (1279-1281) Counsel for the United States stated that he did not object to the admission of these exhibits (1362), but that he thought they were in a measure misleading for the reason that they simply compared defendants' known total shipments, shown by Government's Exhibit 2, to Michigan, Ohio and Indiana with the total consumption in those States. He stated that this comparison made no allowance for shipments of captive coal to these States and that the Bureau of Mines had reported that in the year in question, 1929, 23.1% of all bituminous coal was captive coal. He further stated that Government Exhibit 2 showed that about 3,000,000 tons of the coal shipped by the defendants in this year was shipped to destinations unknown and that defendants' percentages made no allowance for such shipments. He thereupon offered certain explanatory statements analyzing said exhibits and calling attention to

these factors which the exhibits did not disclose. (1363) After discussion between the court and counsel for both parties, it was suggested that counsel endeavor to work out these calculations together and submit to the court a stipulation covering the same. (1373) (Such stipulation was subsequently entered into and received in evidence as Government Exhibit 21.)

[fol. 853] Volume 9 (1359). At this point Mr. Donovan, without objection, read into the record memorandum in connection with Stipulation No. 7, Defendants' Exhibit 1, as follows:

MEMORANDUM

"Memorandum

"In connection with Stipulation No. 7—Defendants' No. 1—

"Note that there is a material discrepancy in production as shown on Table 3, showing in 1929 a production of 99 million tons, and Table 6 of the same exhibit showing distribution from the same region of 107,775,000 tons, which difference should be accounted for.

"This is probably accounted for by the following facts:

"In Table 3 the following tonnages in the following counties were not included in the distribution figures, due to the (1360) fact that most of this territory was outside of the territory actually included in the group of mines contracting with Appalachian Coals, Incorporated, that is to say:

"1. Putnam County (W. Va.) on the edge of the Kanawha District..... 687,000 tons

"2. Tug River Section (Mingo County, W. Va.) on edge of Williamson District, largely low volatile, have 3 companies producing high volatile coal, producing 444,000 tons

"3. Coal River District (W. Va.) entirely high volatile and classed as part of Kanawha District and should have been included in Appalachian Coals territory, but for some unknown reason was thrown outside it, had..... 2,276,000 tons

"4. Clinch Valley District, the production of most of which is high volatile but a small portion of which is low and medium volatile but separated from [fol. 854] the Virginia District and not included in Appalachian Territory, but is included in the distribution—Table No. 6	2,460,000 tons
"5. Tennessee District—Rockwood and Soddy	2,121,000 tons
Tennessee District—Fentress County	673,000 tons
	8,662,000 tons

All of which was included in the distribution figures, Table 6.

This makes a total of 8,662,000 tons which, added to the 99,197,000 tons, brings the total to 107,859,000 tons, or practically the distribution shown for these high volatile regions on Table 6 (1361).

"Since this production of 8,662,000 tons lies in the same producing region and carries the same general freight rates and is the same general character of coal, the explanation should probably be made to clear the record.

"Also, it might be well here to again call attention to the fact that the defendants in the Appalachian region in 1929 had 58 million-plus production out of a total distribution of 107 million-plus tons, or 54.3%."

(1376) Calvin Holmes, another witness called on behalf of defendants, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Donovan:

I live in Knoxville, Tennessee and am in the business of producing and selling coal. I am vice-president of the Harvey Coal Corporation, with mines at Harveyton, in the Hazard district. I am vice-president of the Benedict [fol. 855] Coal Corporation with mines in the old Virginia

district. I am president of the Holmes-Darst Coal Company, which is a sales organization. All three of these companies have their headquarters in Knoxville, Tennessee.

I started in the coal business in 1895 with the R. O. Coal Company of Atlanta, Georgia. They began mining coal about 1903 or 1904. I was with them for fourteen years. I was first city salesman, then road salesman, and sales manager. And for a couple of years I went to the mines, but the most of my experience has been in the matter of sales.

In 1909 I organized a jobbing brokerage company, which (1377) was in Bristol, Virginia, by the name Bewly-Darst Coal Company.

In 1916 I sold out and we organized the Blue Diamond Coal Company. I sold that out in 1922 and bought an interest in the Harvey Coal Corporation, and organized a sales company known as the Holmes Coal Company, which in 1924 was merged with the old Bewly-Darst Coal Company, and is now the Holmes-Darst Coal Company, with main offices in Knoxville, Tennessee, but with branch offices in Cincinnati, Detroit, Atlanta, Spartanburg, and Des Moines, Iowa. It is a coal selling agency. We represent seven mines with an output of between 2 and 2¼ million tons a year. None of those mines is owned by the selling agency. There is an interlocking stock ownership, but none by the selling agency. In regard to the question of whether or not it is customary for mine operators to sell their production through selling agencies—generally speaking there are three plans:

First. Would be for a mine-owned organization to market its own coal.

Second. Another plan would be an exclusive selling agency taking and marketing the output of the mine.

[fol. 856] Third. The third plan would be a purely jobbing company (1378) buying and selling certain amounts of coal from time to time as it is expedient for both parties.

The Holmes-Darst Coal Company has not contracted with Appalachian Coals, Incorporated, to sell its output. The Holmes-Darst Coal Company would be a sub-agent. But the Harvey Coal Corporation has. The Holmes-Darst Coal Company has no stock in the Harvey Coal Corporation, but I have, and other members have. The Holmes-Darst Coal Company has no stock in the coal mine.

The Harvey Coal Corporation has about $750,000 to $800,000 invested in coal, and can produce around 350,000 to 400,000 tons a year. Estimating the cost of that corporation, there is the so-called coal cost, and then overhead, and in figuring our costs we do not figure any commissary profit or house rents, or anything of that sort into the cost of coal. Our overhead would cover depreciation and depletion and we have no bonded debt, owe no money, and therefore have no interest charges (1379).

In 1929 the number of tons of coal produced was 381,037. The mining cost was $1.325. The overhead was 24.1 cents. The total cost was $1.56-6/10. The realization was $1.624.

In 1930 our production was 348,814 tons. Our mining cost was $1.205. Our overhead was 21.6 cents. The total cost was $1.421. Our realization was $1.466.

In 1931 our production was 314,706 tons. Our mining cost was $1.008. Our overhead was 23 cents. Our total cost was $1.238. Our realization was $1.164.

In 1932, for the first six months, January 1 to June 30, our production was 108,317 tons of coal. Our mining cost [fol. 857] was $1.159. Our overhead was 20.4 cents. Our total cost was $1.363. Our realization was $1.024.

I cannot give you the amount of net profit or net loss of that company in the last five years. I did not get those figures.

I was present at the Cincinnati meeting of Appalachian Coals, Incorporated. (1380) I participated in the discussions. I believe that the organization and operation of Appalachian Coals, Incorporated, will give us the power to combat the superpower organizations of electric lines, the super-power organizations of the gas hook-up that is confronting us; that it will give us a live, fighting organization to go out and get business. I believe that it will eliminate practices that have been bad for us. I believe that it will help us in our credit situation. In fact, I wrote down 21 ideas, just jotted them down as I went along, of what it would be. They are as follows:

Ability to take care of the consuming interests: By that I mean the opportunity to go to a man who has a large tonnage and offer to take care of him with safety, and deliver that tonnage and guarantee deliveries.

Market research: I think Mr. Eavenson referred to that. (1381) All of us individually try to do our best to collect

ideas and information as to where coal goes, and what it is used for. But it costs too much to cover the whole market. And this Appalachian Coals, Incorporated, will give us an organization that can do that and spread the information among us.

Necessity for organization to combat super-power organizations: I have already explained that to you. I explained the necessity for such an organization to fight against the superpower hook-up of electrics, and gas and so on. By "super-power" I mean the different power companies, such [fol. 858] as the Alabama Power Company, the Georgia Power Company, and the Duke interests; while they may be individual corporations they are hooked up together.

(1382) They, you might say, allocate territory just by nature of where they are. They will go into the territory and fight very hard for business.

So far as we are concerned we used to look upon a long drought with a good deal of anticipation. We would get some coal orders from some of them from their stand-by plants. But now they are hooked up with each other. They can draw from the section of the country where there is a good water supply and take care of each other, and balance off their own troubles. That let us out in the cold.

Balancing of consumption to production through market service. If we have a mine that is in trouble—long on one grade or short on another we know where it can go. That balancing of consumption in that way would be beneficial to us all.

Better merchandising through a training for salesmen. We have got some wierd salesmen sometimes that we have picked up around the country. I think we can take them out a few at a time and train them and do better with them.

Advertising program that all sub-agents could follow. Follow behind an advertising program that would give them some leadership. Nationally, or east of the Mississippi in its scope.

Classifications of coal through chemical research. I do not know what we will really do, but I think we will have to get some young fellows out of college who graduate in chemistry, and put them in the mines, show the mines how to sample coal correctly and analyze coal, so that each superin-

[fol. 859] tendent will have on his desk the morning after the day before a report (1383) of the conditions of the coal so far as the ash is concerned. That will give him the chemical check on the coal for that day and if he is going high in ash he will see what part of the mine it comes from. Several mines have that now. We do it. It helps us.

Standardization of sizings. We would like to tackle that job, because we have had a lot of talk about that for some years. We have got to face it. Some of the sizes might well be eliminated. I don't know. Coal is the only raw material which cannot be stocked; which cannot be stored at the mines. We desire to put a stop to consignment of unsold coal, which is called distress coal. We have heard a lot about that. In my estimation there are two kinds of distress coal. One is the actual distress coal that has arrived at a selling market like Chicago, Atlanta, Detroit and is there unsold. And either drawing demurrage or about to draw demurrage. Then there is the potential distress coal which is on the track at the mine in cars. It is standing there or at some central billing point like Portsmouth on the Norfolk & Western and the Russell Yards on the C. & O. We have no counter-part of that on the L. & N. We have to hold the coals at the mine. They won't pull it until we give an order for it. That is potential distress coal. (1384) We could avoid that by matching of coals among the mines, taking care of this coal or that coal that needed to be taken care of, so that we would not have to force a run and force this coal on the market and cause a great deal of distress.

I would like to give one idea of what that means sometimes. We have a washing plant in Pocket, Virginia. Some [fol. 860] years ago, about fifteen years ago, I was in Atlanta, Georgia, one day, and I got a telegram saying that they had shipped ten cars of wash slack to Toledo, Ohio, and ten cars to Cleveland, Ohio, on the Big Four, to Calvin Holmes. Well, our going price was a dollar. I jumped on the train and went to Toledo as fast as I could. I managed to sell that coal before it got to Toledo for about 75 cents a ton. It was a forced sale. When I got to Cleveland the Big Four there didn't know who I was, and he had called up almost everybody to find out where I was, to send me notice that the cars were there. It took the hair off my head. I sold the coal for ten cents a ton. Everybody knew

it was there. It couldn't go any farther; it was the end of the line so far as I am concerned. And that is the share of the trouble that the distress coal can give us.

The first ten cars in Toledo were sold for 75 cents a ton. The last batch I sold for ten cents a ton. Coal was a dollar a ton. That was about ten years ago. I am wrong about that, that (1385) would be during the war. It was just before the war. About 1914.

Eliminating peaks and valleys in production and giving steady working time. That would really result in the men earning more dollars per week or per month, which is something we would like very much to have them do. They are working three days a week now. They do not get enough to live on all the time.

The testing of coal in consumers' plants. A test goes in there. It costs money to the consumer, it costs money to the coal company. The coal company sends a combustion engineer. There are his expenses. If by our own analysis of coal in our own laboratories we could grade coal, grade [fol. 861] our coal, grade A, say, would be 6 per cent ash coal, we would say, and 14,000 b. t. u.'s, and grade B would be 7 per cent, and so forth, and we could impress upon the buyer that we meant just what we said, to give them just what we sold, they would know when we were offering this coal that it would not be worth-while testing it all the time. They would merely take our word for it. That would be a saving of expense.

Sales planning. Very little of that can be done individually by us. We can plan but we can not perform. We hope to be able to perform better.

Credit information. I touched on that before. That is very vital to us. When you get the distress coal you sell it to somebody—you hope he is good.

Assisting retail dealers in campaigns to the ultimate consumer. All the ultimate consumer knows is that coal is black and dirty. We want to tell them that ours is not as (1386) dirty as the rest of them.

Better preparation inside of the mines. Those inspectors I spoke of could help us a lot there.

Increased tonnage. There is a gentleman here named Dr. F. O. Clements who spoke before the American Society for Testing Material. I read it in the paper.

He pointed out that there was extra opportunity for us, and we do not want to let go of that and let it go to the electric people and the gas people. We want to have a vigorous organization to fight for that share (1387) in the future that is ours, if we can take it. That won't be ours if we are just individuals as small as we are now.

(1388) Another point is the adjustment of tonnage when orders are received, some producers being long, and other [fol. 862] producers being short on a grade that is similar. That would be a great help.

A department to handle rejections. There are two kinds of rejections, a rejection that is justified, and one that is unjustified. If coal is badly prepared and is rejected, that is justified, but occasionally buyers will reject coal to beat the price down. We would have an inspection department to go and look at it, and prove the case, and in fighting it that way we could eliminate that. Then, I think the last thing is to give leadership in the industry. That would be a big item. We need it.

At the meeting in Cincinnati we discussed the competitive situation and what we hoped would result from the operation of Appalachian Coals, Inc. The result of that discussion was embodied in a statement. You have here Exhibit "A" attached to the answer, which has been submitted to the court, and page 7, the second paragraph, sets forth exactly what we said we would do, and what we will stand by now, what we are fighting for now. That represented my then opinion and my present opinion.

Cross-examination.

By Mr. O'Brian:

I have attended practically all of the meetings, the New York meeting and the Cincinnati meetings. I was appointed by the New York meeting one of the committee to organize my particular producing district. Two or three of my companies are defendants.

Q. Was nothing said in your hearing at any of those meetings about the necessity for getting a better price for coal, or how to get a better price for coal?

A. Right in that paragraph I refererd to, we hoped for better realization. We say so in that paragraph; in that sense, yes.

Q. That was really one of the main interests?

A. I hope and expect to get a better realization.

Q. As a result of the organization of this agency and the program you have outlined?

A. Yes; our activities, we hope, will bring us that.

[fol. 863] (1390) If there was a plan proposed by Mr. Bell at the New York meeting, I have forgotten it. There was a great deal of talk. There was only one plan suggested at the Cincinnati meeting. The New York meeting had several discussions. Only one plan was suggested after the New York meeting. There were other plans submitted and discussed at the New York meeting. Mr. Burlingham submitted a plan that I remember. There was so much discussion, I don't remember all of it; and Mr. Steinbugler's plan. No, I don't remember in connection with Mr. Burlingham's plan, Mr. Morrow saying that he was interested in that plan because it looked towards control of production, or words to that effect. I did not get that impression at all. The discussions at these meetings seemed to center around about (1391) two plans, the one we adopted and the Burlingham plan. The others were seemingly not very——

Q. They were submitted?

A. Yes, they were submitted.

Q. Some of those dealt with suggestions aimed to provide some method for stopping this over-production, did they not?

A. Well, sir, we do not admit that there is an over-production. We admit that there is an over-capacity.

Q. The over-capacity does not do you any harm, does it, until the production results?

A. Sure enough.

Q. I am asking about over-production. Do you mean that you distinguish, and say that in those meetings there was discussion of there being too much over-capacity?

A. It is very hard to remember what took place at the meetings, but I was up there to further the Burlingham plan officially. I was sent up there by the Kentucky crowd. [fol. 864] I don't remember all the plans that were proposed.

I have been designated as sub-agent by the Harvey Coal Corporation, that is, the company with which I am identified.

I don't remember that the National Coal Association some time ago tried to (1392) interest its members in the subject of advertising and tried to get some money from them for that purpose. I don't remember any discussion of that in the National Coal Association. The truth was that the Burlingham plan was so awfully radical, we just voted it down.

(1393) With regard to my own expenses: The figures I gave show a realization for 1929 and 1930 per ton, above cost. And for 1931 and 1932 below cost. The loss shown for 1931 and 1932 was caused in part by the decreasing demand and lack of organization on our part. We did not have any lack of organization in the other two years; we had a better situation. That is due in part to the depression and the lack of demand. (1394) In regard to amount which we charged off per ton for depletion, amortization and depreciation: We have very small salaries. The figure given for overhead carries depreciation.

By Judge Soper:

Q. I should like to ask if we set aside distress coal for the moment, much of this favorable realization could have been obtained by an organization such as you have devised but which did not possess the power to fix prices, could it not?

A. It is all so tied in together that I hardly know how to answer your question. Certainly if we cannot get a better realization from our coal, we are all going broke. (1395) I don't think we could have gotten—well, taking them one by one, if you like, I could go over it, but I don't think we [fol. 865] could get very far unless we would have the ability to tell the members that what we are all raising money for, for advertising programs, and research programs, and so on, that it will make a price among ourselves that will, at least we hope, give us a better realization. We hope that the organization of Appalachian Coals, Inc., will enable us, with the downward trend of today, as Mr. Francis put it, to run down in a more orderly fashion, and when business is better and prices go up, that we will get our share of the better business conditions that are available. (1396) I hope and expect it will get me a better realization for my coal. That is the reason I am spending my own money to work on it now.

EDGAR C. MAHAN, another witness called on behalf of the Defendants, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Donovan:

I live in Knoxville, Tennessee, and am in the coal business.

I am president of the Southern Coal & Coke Company, a selling organization. I am president of operating companies, the Southern Mining Company, the Southern Collieries, Incorporated, the New Careyville Coal Company, the Mahan Jellico Coal Company; and I am an officer and director in five other operating companies.

The Southern Coal & Coke Company is a selling organization. (1397) It sells for 16 mines. With one exception they are all mines in which I am interested. The production of the mines in which I am an officer and part owner amounts to some 2½ to 3 million tons a year, normally. [fol. 866] Their productive capacity, on the basis of 8 hours operation a day, would run somewhere in the neighborhood of 4 million tons yearly. That production could be expanded, or it could be operated on two or three shifts, if we had the necessary business. The capacity would then probably run to 10 or 12 million tons annually.

Our markets are generally the markets of the Appalachian field that have been described here, both in the north and in the south. We ship to the Carolinas and to Georgia. I have not our tonnage segregated by States, but in a general way there have been about 37 per cent of our output that has gone into the territory south of the Kentucky- (1398) Tennessee line. Normally our output ranges from about 2½ to 3 million tons a year. At the present time it is substantially less. Our coal is used for all the purposes that coal in the Appalachian region has been described as being used for.

In the Carolinas and Georgia we meet competition from other coals. Since 1929 we have met competition from all the coals, of course, produced in the Appalachian field proper, and from a great many of these mines that are in this so-called Outer district of the Appalachian field; and from the Smokeless fields of West Virginia, and from Ala-

bama, and some slight competition from this producing field in North Carolina. None of the coal from any captive mines in the Appalachian territory goes into the Carolinas or Georgia. I mean by that, that so far as I know, there are no plants in those States that have their own captive mines. But there is a great deal of so-called captive coal that is shipped into those States, but it is sold commercially. (1399) That is, it is sold commercially in competi-[fol. 867] tion with other coals. I know very definitely that, as Mr. Tate testified the other day, coal from his captive mine did go into the Carolinas in 1930 or 1931 and is still going in there.

Whereupon Defendants offered in evidence a statement showing shipments of bituminous coal to all destinations in North Carolina, South Carolina and Georgia. This statement was received in evidence and marked Defendants' Exhibit No. 36 (1400).

This statement was made under my supervision. It shows the shipments of bituminous coal for the calendar year 1929 to all destinations in North Carolina, South Carolina and Georgia. First is the total received by all destinations in each State. Then, second, the shipments made by the defendant companies to all destinations in each State. And third, the percentage of shipments that those of the defendants bear, to the total tonnage received from all sources. Then in North Carolina the total shipments were 3,927,883 tons. The defendant shipments were 1,595,106 tons, or 40.61 per cent.

The figures for South Carolina are 2,583,453 tons as a total, while the defendants' shipments were 1,213,787 tons. The percentage of defendants' shipments to those of the total is 46.98.

(1400) In the case of Georgia, the total shipments were 3,626,494 tons. The shipments by defendants were 1,310,-532 tons. The percentage of the total shipment made by defendants was 36.14.

[fol. 868] (1401) In enumerating my various and sundry important coal offices I overlooked one of the most important: That I am vice-president of the Appalachian Coals, Incorporated.

In the event that Appalachian Coals began to operate and sold its coal in the Carolinas and Georgia it would not be

able to exclude from that territory as competitors either the non-defendants here or the coal from other fields. I think perhaps I am more familiar with the competitive situation in these three states than I am anywhere else, because in the first place I have lived in the South all my life, and I have personally been over this territory, almost in every town of any considerable size, and I believe I am reasonably familiar with the conditions in this territory from a competitive standpoint. As has already been said in this case by some witness, it is rather difficult to see where any one section is more or less competitive than the other. When you get out trying to sell coal the situation seems about as difficult in any one part of the territory as it does in any other part. And certainly as far as we are concerned the situation in this territory is just as competitive in every way as it is in any other territory that we attempt to cover.

(1402) There would be absolutely no chance for Appalachian coal to exclude any of the competition that exists at the present time.

There is no reason to expect that any of the mines that are producing coal and serving this territory at the present time are going to voluntarily retire from business. There is no reason to expect that this super-power hook-up [fol. 869] that has been referred to, that thoroughly traverses this entire territory, is going to retire from business. There is no reason to suspect that the immense natural gas development that has taken place in the Southeast—extends from Rome, Georgia through to Macon, Georgia, and practically the territory west of there, in the state of Georgia, Alabama, and that is to be projected through this territory on through to Washington, according to the proposed plans—there is no reason to suspect any let-up in that competition.

There is no reason to suspect that the oil people are going to be any less active in their competition than they have been before. As a matter of fact there are Diesel engines being installed right in the coal fields. And even at the present time as far inland as Charlotte here there are a (1403) number of Diesel oil installations. I say a number—I mean, that is, more than one. I do not know the exact number. I know of two there. I understand there are more. So, so far as any lack of competition is concerned in this southern territory I am very sorry to say there is no chance

of any letup, so far as I can see, not only for the present time, but anywhere in the future.

We have to meet the actual competition from these other fuels today in the Carolinas and Georgia; from natural gas, from hydro-electric power, and from fuel oil. Constantly increasing quantities of all three. In regard to whether Appalachian Coals, Inc., has the power to fix the market price in that territory: I believe that it would not have any more power than the Southern Coal and Coke Company has power to fix it today. I say that because the competitive factors are such that Appalachian Coals, Inc.,—assuming that these companies, 116, or whatever the number, have become [fol. 870] effective, that is become efficient, capably managed—the production of the coals on the outside, of nondefendant companies and of other competitors is such that so far as the Appalachian Coals, Inc., being able to name an arbitrary price and maintain it or to secure any price above what the competitive conditions would enable them (1404) to get would, in my opinion, be absolutely absurd. I think I have fairly well described the competitive conditions in that market out of which comes the competitive price. You have all the factors of the coal competition, the oil competition, the gas competition, and those are the principal factors that go to make up what is market price in this territory.

I was present at the Cincinnati meeting and participated in the discussion. Almost every line of discussion that coal men can think of was discussed in connection with Appalachian Coals, Inc., and problems of the entire industry. (1405) My idea of the purpose and effect of the organization of Appalachian Coals, Inc., is this: I think that it is the concensus of opinion among coal people—I do not think it, I know it—that so far as producers of coal we are fairly efficient. This country produces the cheapest coal in the world, and has done it for years, and has paid a higher wage scale than any other country in the world. (1406) But when it comes to the selling of coal, we have been lamentably inefficient. As has been testified to here before, we have struggled like everything to save a half-cent in our cost of production, but we do not hesitate for a minute to cut the price 10 cents, or do even more than that. That selling situation has been the bane of the industry for years, and has been the one thing that those concerned with the prog-

ress of the industry felt required the most attention. I served as president of the National Coal Association for something over two years, and I know that, as a general [fol. 871] proposition, it was felt that the one crying need of the industry was better selling than the industry had.

This Appalachian Coals proposition was the result of a plan that was worked out, I might say, with prayerful and almost tearful consideration. The situation was so acute that the Governors of Kentucky, Pennsylvania and Ohio, and particularly the Governor of Kentucky, was so exercised about it that he had his secretary talk to a number of us in connection with what he had in mind, about an arbitrary restriction of production, and even when it was suggested to him that personally we would be glad to unload some of our coal troubles on the State if he would create an artificial restriction in the car supply by some sort of State mandamus or otherwise, and that naturally we would not have any objection to it, we could not see, from our situation and our consultation with our attorneys, where he could do that legally, and we did not feel that we wanted to be a party to something that we did not believe was law to put through. The Governor's secretary said to me, "If you operators will come in and work out this thing, and agree (1407) on a plan, we will see that it is put through. We will find the law to put it through."

That is the plan Mr. Holmes referred to as the Burlingham plan, which, in substance, was the creation of an artificial car shortage by the State government. It was a restriction with teeth in it, and it did appeal to a great many operators, and they would like to have seen it put in, on account of their desperate situation, if they thought it could have been worked out along the lines the Governor indicated. There were others of us who thought it was thoroughly impracticable, and that there was no chance for it to be a success, and that it would simply involve us in a lot of trouble.

[fol. 872] I formed the opinion myself here, in listening to the testimony, that the impression may have been gained that the adoption of this plan in the first place, at the New York meeting, and the formation of Appalachian Coals, Inc., was something that the operators, perhaps, were rather eager to get into, and that it was easy to get this thing started. I served as the subcommittee chairman of

this group in New York which worked out and finally reported this plan. While it was adopted unanimously, I think that a substantial portion of the operators never expected very much at the time. The Central Pennsylvania operators announced frankly that they did not expect to use it. (1408) But the industry was in such desperate condition that, for the first time since I have really known anything about the coal industry, a plan was adopted unanimously, and it was at least agreed to see whether or not the thing was worth a trial. Appalachian Coals, Inc., was formed only after intensive work on the part of a number of the operators who had taken part in the New York meeting, and a number of the other operators in the Appalachian territory to whom the plan was subsequently explained.

The purpose of Appalachian Coals, Inc., is outlined in detail in Defendants' Exhibit "A," attached to the answer. That is the purpose I had in mind in joining Appalachian Coals, Inc. I think the organization of Appalachian Coals, Inc., is going to have a helpful effect on the coal industry, or certainly I would not have been disposed to have spent the time, and so forth, in connection with it that I have. I believe that it is the most constructive proposition that has yet been made, towards a solution of (1409) the outstanding problems of the coal industry. It should enable us to market our coal, which I stated a few moments ago was probably the outstanding need of the industry, in a much more intelligent method.

[fol. 873] In regard to the way in which the sub-agents will work: The Southern Coal & Coke Company is designated as a sub-agent, by a number of these mines, and, of course, we do not know exactly how we will work, to be perfectly frank about the matter. We will not know that until the plan has been in operation for probably a year or so, as to just exactly how these sub-agents will work. The scheme contemplated under that plan is that Appalachian Coals, Inc., will designate these sub-agents to sell the output of such mines as designate a particular sub-agent. The selling agent can designate more than one sub-agent for a member. What I mean by saying that I do not know just how we will work, is that I do not know just the details of how the hook-up will be. So far as the general plan is concerned, of course, that is stated in this exhibit. These sub-

agents will market the coal for these companies, under the advice and (1410) direction of Appalachian Coals, Inc., in substantially the same manner that they have always marketed it heretofore, with the exception that, of course, they will have the general direction that will come from Appalachian Coals, Inc., as to price, and, for that matter, Appalachian Coals, Inc., will have the general supervision of the sub-agents in their handling of the business.

(1411) By Judge Parker:

Yes, I have a selling agency and I am also interested in a number of mines. I am to be appointed one of the sub-agents of Appalachian Coals, Incorporated. Assuming that I go out and get an order for say 100,000 tons of coal. If I get an order for 100,000 tons of lump coal that would be an order for 100,000 tons of coal produced by our mines and we would report that to Appalachian Coals, Incorporated.

[fol. 874] By Judge Parker:

Q. What I don't exactly understand is this: How a fellow is going to be satisfied who has turned over to Appalachian Coals, Incorporated, and to sub-agents, the right to make sales, and refrains himself from going out into the market and seeking business, if the business which is obtained by the sales agents is obtained, not for the sales agency as a whole, but for one particular member of the agency, or for one particular mine represented by it. I don't see how in the world a situation of that kind can be prevented from raising all sorts of rows in the agency.

A. Well, your latter conclusion is probably (1412) correct in any event. But the fact remains that we have exactly the same problem now in our own organization.

Q. Explain that to me. That is what I do not understand.

A. You take the case of our sixteen operating companies, and we have that very thing now continously. In other words, we will go out and sell coal for one of our companies, and if it happens to be a pretty successful sale, the securing of a pretty good piece of business, and gives that mine pretty fair operating time, immediately all of the others are on us to know why we cannot do the same thing for

them. And the result is that it is up to us to get busy to move the coal from the other mines.

And your Honors have been hearing so much about this matter of competition within ourselves. Well, right there is where it starts. A's mine gets an order, and B mine—and all these mines of ours I might say are practically a common ownership, a common ownership I mean to a very great extent in the matter of the mines, and a common [fol. 875] ownership in the sales' organization, or you might say it is just a family affair.

And yet when A's mine in our organization gets an order, and B mine right next to it does not have an order, and A mine starts running, we will say, four days a week, then B mine is right after us to give him a comparable operating time to what A mine has.

And if B mine does not get it then A mine pretty soon commences to take away his labor and everything else, and the reduction in B's operating time so affects his cost of (3413) producing coal that pretty soon he will say to the Southern Coal and Coke Company, "You go out and get us business if you have to cut the price. We cannot sit here idle."

That is just simply an illustration, your Honor, of what goes on almost daily within the Southern Coal and Coke Company now, and of what will go on almost minutely in the Appalachian Coals, Incorporated, if formed.

By Mr. Donovan:

I don't see that there would be any difference between the operation of Appalachian Coals, Incorporated, as a selling agent, and the operation of the Southern Coal & Coke Company at the present time as a selling agent, except in the matter of size. It will be larger and should be able, of course, to serve its clients in better shape than a smaller company.

By Judge Soper:

Q. To follow up Judge Parker's question: Will you explain from the standpoint of the selling agent, and you have described the differences that arise between producers and the selling agent when the producer thinks that the selling agent is not treating him fairly. There must be some

selling agents in the market who are chiefly interested in themselves. They want to get business and to make their commission or whatever they sell the coal for. Now then, [fol. 876] you have such selling agents who hereafter will not be free and unhampered, but who will have to do what Appalachian Coals, Incorporated, (1414) tells them. For instance, a sub-agent goes after a certain big purchaser of coal and wants to sell some coal to him. Now Appalachian Coals, Incorporated, may think, may they not, and I am trying to find out how it will work, that it is bad business to try to push that particular coal on that particular person; that it might be to the benefit of the industry to get him to take some other coal, or to take coal at some other price. What I cannot understand, and I should like for you to explain it to me if you have thought it out yourself, is how that is going to affect the business of the selling agent, whether his style, so to speak, will not be somewhat cramped.

A. Your Honor, I think it will, and I think it will have to be if Appalachian Coals, Incorporated, performs any service that is worth while to the coal industry. I do not mean by "cramped" that it would be seriously interfered with in any way. But if we have been cutting our throats in this destructive competition that, as is generally said, has prevailed and continued in the coal business in the past, we have to quit cutting our throats if the industry is going to get well. There is going to have to be a certain amount of control over sub-agents if we are to have a healthy condition in the control of the coal industry.

I will say to you frankly that we are all more or less groping in this proposition. This is something new, and it is untried. When the idea was first suggested to me (1415) at the New York meeting it did not appeal to me in the least. I went into the Committee without the slightest degree of enthusiasm on the proposition.

[fol. 877] But as we went into it, and talked on it, it looked at least as though there was the possibility even, if there was not the probability, that it might solve this problem that we have in the coal industry. And inasmuch as it is the only thing that has been suggested that looked like a reasonable way out, why, we felt like it was our duty to give it the benefit of the best trial that we could.

Frankly, I do not think, and certainly I do not know, just how all these details are going to work out, and as to a

great many of the inside workings—and I do not mean by that in any insiduous way—I mean simply that the details as to how sub-agents will work, and so forth, and such things as that, frankly I have not been able to think them all the way through to a conclusion, and I do not believe anybody else has; but we are going into this thing if we are permitted to do so and are going to give it an honest trial. And I think we can tell within a year or two whether it will work or not.

(1416) The selling agent usually gets today a commission of from eight to ten per cent.

(1417) By Mr. Donovan:

I am familiar with the shipment and distribution of coal into the city of Canton. The exhibits showing the freight rates in that city is contained in Defendants' Exhibit 3.

Canton, North Carolina is situated approximately 16 or 18 miles west of Asheville, and I think is probably one place where if there would be any chance in the world for Appalachian Coals, Inc., to exercise a monopoly I believe Canton would be perhaps the most favored location.

[fol. 878] There is one industry there, the Champion Fibre Company, the president of which, Mr. Reuben Robertson, has already testified in this case for the Government. Our company has contracts with the Champion Fibre Company for approximately a minimum of 60 per cent of its requirements. We have been furnishing them coal for a number of years. They formerly operated a mine of their own in the Coal Creek field, which we subsequently purchased from them. They have recently (1418) installed probably the most modern plant for the burning of coal perhaps in the United States—certainly in the South. It was completed something over a year ago, and at the time of its completion was the last word in the use of powdered coal, which is generally conceded to be probably one of the most efficient ways to burn coal where it is properly installed. There is no need of any particular kind of coal in a powdered coal plant. With the exception that the fusion point of the ash occasions some trouble. If they get an ash that fuses at too low a point why they can have some complications and increase their expense. As a matter of practice they can burn most anything, and that is one of the advantages of a powdered coal installation.

Now the rates to Canton vary from $2.19 up to $3.37. $2.19 from the Coal Creek district; $2.24 from the La-Follete district; $2.30 from Jellico and Middlesboro; $2.29 from southwest Virginia. The rates of $2.37 per ton from three districts in Middle Tennessee.

This plant, the Champion Fibre Company, consumes something like around 750 tons of coal a day. I think perhaps by referring to this map, Defendants' Exhibit No. 9, [fol. 879] you will see that the most available coal to Canton comes from the lower end of the southern Appalachian field, and from this section here (indicating) in southwest Virginia. That is from the southwest Virginia section of the Southern Appalachian Field. Now they have the more favorable freight rates into this territory. The section which is (1419) immediately north of Coal Creek has practically a five-cent higher rate than Coal Creek. And that section extends from a few miles north of Coal Creek almost to the Tennessee line in the Appalachian territory. Then the section from practically the Tennessee line up to but not including the Harlan field has practically a 10-cents higher rate than the Coal Creek field. And the same rate practically as the southwest Virginia field. So this whole territory from Coal Creek, including Southwest Virginia, and all the territory embraced in the southern end of the Appalachian field up to Harlan County moves in there with only a spread of 10 and 11 and maybe in some instances 12 cents. There is some slight variation there in those rates.

The territory south of the Appalachian field, in this so-called outside territory, comes into Canton on a rate of $2.37. As compared with the lowest rate of $2.19 here from Coal Creek. All that whole territory is of course available to Canton. The Harlan field comes in there at 11 cents higher than the southwest Virginia rate. All the non-defendants in this entire Appalachian territory I can assure you from personal knowledge are actively after this business.

This territory in the lower part of Tennessee has a rate that enables them—has enabled them at times to ship some coal into that territory.

[fol. 880] I cannot conceive of any situation arising whereby any consumer at Canton, North Carolina, could

possibly be imposed (1420) on to any appreciable extent in connection with his source of his coal supply. If all this entire Appalachian region there should be put into one sales agency and all of them arbitrarily fix a price to the Champion Fibre Company they would have this territory (indicating on the map) to draw from, at perhaps a little higher freight rate, or they could very easily do what they have done in the past—step out here and pick up a few hundred of these several million of acres of undeveloped coal land and develop the coal mines to supply their own requirements.

Frankly, it is inconceivable to me that by any possible chance any injustice could be done to the Champion Fibre Company by Appalachian Coals, Inc., even if they were so disposed.

In regard to the ability of Appalachian Coals, Inc., to balance orders received: The balancing of orders is at all times a difficult and serious situation. For every selling agency, including our own, it presents one of the serious problems of the coal industry, as has been very capably described here before. It is probably the immediate cause of the distress coal situation.

(1421) The larger the organization, the easier it should be to balance orders. In the 16 mines that we operate, it is much easier for us to balance our orders, than it would be if we had only the one mine. Several of them produce similar grades of coal. We are enabled in the first place to solicit business of a much larger volume than would otherwise be the case. For instance, we are in a position to take Lake tonnage, that requires large shipments and very prompt movement, and naturally a large consumer of coal [fol. 881] wants to have as many sources of supply behind his requirements as possible. For that reason, it is easier for us to get business operating as the Southern Coal & Coke Company, than it would be if those same companies were operating independently. Appalachian Coals, Inc., of course, will be substantially larger in size, and cover a wider territory. They should be able to balance business better than even the present existing sales agencies, because they will have a much wider spread of territory and many more coals to handle, and should be able to work out a more favorable and equitable result.

Of course, it certainly should be in a position to have better information on marketing conditions generally. That is one of the important elements in the balancing of orders. I have *been* attended, practically all of this trial and I have heard the question asked by Mr. O'Brian on (1422) more than one occasion, based on the assumption that all the districts or coal fields in the United States should be organized. Assuming that condition to exist, I believe that the result on competition would be that in all probability there would be more active competition.

I think this is a fair illustration of it. I will just use our own case for example, the Southern Coal & Coke Company. My predecessor here on the stand was Mr. Holmes, of the Holmes-Darst Coal Company. The Southern Coal & Coke Company would much prefer to compete with the 7 or 9 mines—I have forgotten which—going to make up the Holmes-Darst Selling Agency, as individuals, rather than to compete with them selling their output through the Holmes-Darst Coal Company. As long as they are operating as individuals, they are handicapped when it comes to taking this business that requires volume and special care [fol. 882] to handle. But when we meet the 7 companies in competition as the Holmes-Darst Coal Company, with the very intelligent management and operation that is given them under Mr. Holmes' direction, we find them much more serious competitors than we find them as individual companies. (1423) I am not certain, but it is my opinion that if all these districts were organized, the competition among them would be more intense than it is now, for the reason that the competition would be more intelligently directed.

Cross-examination.

By Mr. O'Brian:

That would not necessarily be eliminating what is called the ruinous competition between the operators who previously were not so well informed about conditions. I hope it would, but at the present time this cut-throat competition, of course, is more or less prevalent, in large and small companies, too. I guess those of us who think we are large are about as guilty of it as the others that are small. Whether we will be able to get away from it when we get into such concerns as Appalachian Coals, Inc., and these organiza-

tions, I am not prepared to say. We should get away from it. I will say that.

(1424) Taking Colonel Donovan's assumption that we have the 11 great producing districts, each organized into a separate selling agency, I do not know whether under that arrangement there would be a much smaller number of operators fighting each other individually for business, and cutting prices. I don't know whether it will work out that way or not. It should. I stated at the outset of my testimony that one trouble at present was that competition was [fol. 883] so acute that a man would go to work and cut the price 10 cents a ton, whereas if he had known more about the situation he would not have done that. I think this selling agency plan will lessen that kind of competition. If you had all the selling agencies organized that would necessarily result in a lessening of that price competition so far as the number of operators were concerned that were offering coal at different prices. (1425) But if these other units should start doing the same thing that we all do more or less now, the competition might become considerably more intense and aggravating.

Q. Take the illustration I was using yesterday—myself being a consumer of coal. I want coal today, we will say a thousand tons of a given grade of coal. As I understand you, there are a great many people willing to supply me?

A. I think that is a conservative statement.

Q. I go to the defendants, and, for example, 136 of them are trying to get that business, my business; and in addition to them, there are others outside trying to get it too. Would not that have a tendency, naturally, to get the price down, assuming they were acutely competing for my business?

A. Theoretically, it would seem that it should.

Q. Doesn't it?

A. No. I will illustrate, if you will permit me. Just as I mentioned a minute ago, in connection with these two selling agencies, we find as a practical proposition, and from a purely selfish viewpoint, that we would rather have all these units selling their own coal, than we would to have them selling the other way. I am speaking of that from the [fol. 884] other way. I am speaking of that from the standpoint of a competitor.

Q. I am talking about the standpoint of myself, as a consumer. What difference does it make to the consumer?

A. I think it is the same proposition, so far as the consumer is concerned.

(1426) Q. You would not say, would you, that with 137 people competing with each other, trying to sell me coal, that that would not have a tendency to lower the price of coal to me in the market? Of course, I am assuming a condition that might not exist in the scope I have described, but I am assuming 137 of these defendants, each trying to sell me, a consumer, coal, and anxious to sell me. There is what you call acuate competition among them?

A. Yes.

Q. Under ordinary circumstances, would not that have a tendency to decrease the price of coal in the market?

A. Theoretically, the greater the number of competitors you have, supposedly the greater competition.

Q. Now, then, under the sales agency plan, instead of the 137 in that group, there would be just the sales agency?

A. That is right.

Q. Do I take it as your opinion that you think I would buy coal just as cheaply under those circumstances, as a consumer, as if the 137 were fighting for my business?

A. It might be that you would pay a little more. Certainly I hope you would.

Q. The consumer seems to be unpopular here. Is it not fair to say that you hope and expect that the effect of this [fol. 885] selling agency will be to increase the price of coal somewhat, to some degree, to the consumer?

(1427) A. I hope that the price will be increased. Now, by way of explanation of that statement, let me say that I think this: That if we as business men are unable, with this kind of set-up, to more intelligently and more systematically and more thoroughly market our coal, then we are very poor business men.

And we should be able to increase our realization. If we can increase the uses of these coals, expand their consumption, then that is the best way to relieve our situation.

Frankly, I will say that we are not interested so much in the matter of price, as we are in increasing the consumption of coal.

Q. Increasing the consumption of coal?

A. Yes. And we want some more price, too, incidentally.

Q. It wouldn't do any good to produce any more coal at the present price, would it? It would drive the price down further?

A. Frankly, we would be perfectly satisfied if we could produce double the amount of coal we are producing today, and at the present price. I do not know how long we would be satisfied, but we would be satisfied for the moment, anyway.

The doubling of our running time would so substantially reduce our production costs for coal, that even with the present low prices, we would not be reporting some of the figures (1428) that have already been given here.

As a matter of fact, if I might just continue along one line for a moment, in connection with this price proposition: What the coal industry needs very much more than an [fol. 886] increase in price, is an increase in consumption. An increase in consumption so reduces our operating costs that it simplifies our problem tremendously. All this talk about increasing the price, is of course very nice, and naturally under existing conditions, the coal industry needs it, and needs it tremendously, and if we don't get it, we are going on the rocks. Labor is poorly paid at the present time. We want to pay them more, and we would like to pay them more, and the industry needs some return on the investment.

I do want to say in connection with the whole coal industry, the crying need of the industry is lower freight rates, and lower delivered price of the product to the consumer. We have gone as far as we can in decreasing the price. And to increase the price of coal by any amount of consequence, would do the coal industry untold damage.

And I might say that one of the functions in connection with this Appalachian Coals, Incorporated, or one of the things I think it can accomplish, or one of the greatest uses for it (1429), would be that if ever a period does come when we have a normal demand again for coal, would be to see, or to use its influence to prevent buyers coming into the coal market and bidding up prices, thereby causing an abnormal situation again, such as we have just passed through.

The contract provides that the selling agency shall always get the highest obtainable price for the coal. Our contract provides the same thing. It has not been my experience that where you have in the selling market one or two large and powerful groups, that there is a tendency [fol. 887] to accept their leadership by the smaller fellows. I am sorry to say that there never has been any such condition prevailing in the coal business. It should prevail, but it does not. Defendants' Exhibit 36 purports to show that the defendants' percentage of the total coal shipped into North Carolina in 1929 was 40.61 per cent. It is a fact that in the first column, the total shipments, I have included there all railroad fuel. (1430) In other words, the figures now being used in Defendants' Exhibit 36 are not taken from the map on the wall, which is known as Defendants' Exhibit 9. But it agrees with figures that we have available. So that the total of my first column, that is, the total of all shipments into North Carolina, is shown as 3,900,000 tons in round numbers and that is inclusive of railroad fuel.

Q. But in the second column, the defendants' shipments into North Carolina, no allowance is made for the amount of railroad fuel sold by defendants and shipped into North Carolina, is there?

A. Well, now, I will say that this thing was prepared under my direction, but I did not attempt to go into the details of it very accurately. But I think that the railroad shipments were included in both instances.

Q. No, they were not. But of course I did not mean to contradict you.

Mr. Donovan: Mr. O'Brian, I think you are right about that, that they were not.

By Mr. O'Brian:

Q. Well, then, this percentage would not be a correct percentage?

A. You claim that the railroad figures were not included in this first, or that they were included in the first column (1431) and not in the second?

[fol. 888] Q. Yes. And so that would throw out of line the percentage you have arrived at, to that extent?

A. Yes. It will affect it to that extent.

Q. I will offer an explanatory statement of this. The two columns are not on a comparable basis, is my point.

Mr. Donovan: As I suggested before, we want to sit down with Mr. O'Brian, Government counsel, and see if we cannot agree on comparable figures.

Mr. O'Brian: I am perfectly willing that you should whittle down the figures already in, if you can do it.

A. At any rate, it would not affect the general results, appreciably.

Mr. O'Brian: Oh, yes, indeed it would.

(1432) Redirect examination.

By Mr. Donovan:

I have prepared a partial list of the companies in Georgia that have changed from coal to oil, natural gas and hydro-electric power during the last three years and the approximate annual tonnage of coal each company would normally consume. The defendants offered in evidence a list of companies in Georgia that have changed from coal to natural gas, oil and hydro-electric power. This statement was received in evidence and marked Defendants' Exhibit 37 (1433). This list comprises only companies that we have had reported to us, that is, to the Southern Coal & Coke Company, by our sales representatives in Georgia, as having changed directly to natural gas, oil, and hydro-electric power within the last three years. It embraces quite a large number of companies, and the aggregate tonnage of 471,000 tons of coal (1433) there is shown, together with the name of the [fol. 889] company, the location, their normal annual consumption of coal, and the substitute for coal that they are now using.

The figures for the normal annual consumption were reported by my agents.

By Judge Northcott:

Q. On the second page, the fourth line from the bottom, you have not put in there what the companies are now using?

A. I am thoroughly certain, or reasonably certain of my own information that this is hydroelectricity. I do not know (1434) how that came to be eliminated.

By Judge Parker:

In making my calculations I have not taken into consideration the increased coal tonnage that would be used by the electric companies. As a matter of fact, there is very little, I will say, for the past two years, very little coal used by the power companies in Georgia. There is very little use of coal to produce power by the power companies in Georgia, because they have had this hook-up with the Muscle Shoals proposition. And in the first place, there has been comparatively little time when they have not had all the electricity of their own that they needed. I think during the period of the drought last year, they drew on Muscle Shoals for a while. So as a practical proposition the amount of hydroelectricity generated by coal would be a very small percentage.

By Judge Parker:

Q. In the litigation that we had recently in South Carolina, one of the great electric companies that supplies (1435) the State of South Carolina, supplied electricity both by burning coal and by production through waterpower.

A. That is true.

Q. And in South Carolina, in reference to that particular feature, I mean that particular company, my recollection is [fol. 890] that it sold more electricity generated by the burning of coal at its Charleston plant, than it got from waterpower over from the Georgia Power Company (1436).

A. Well, that occasionally happens. And under normal conditions when the power companies have what you might say substantially a full load they will frequently for as many as three and sometimes six months out of the year have to use their stand-by plants to generate electricity. Now they used to do that quite a little. But since they have got this super-power hook-up here that has been mentioned, which extends all the way from Niagara on through to Muscle Shoals, why the time that they burn coal has become suprisingly small. Of course for one thing their consumption has been less. But it is a matter, I think, of common knowledge that the Aluminum Company now, for instance, has some surplus power, and that the Duke Company in preference to coal can purchase their power from some one of these connecting concerns on a much better

basis than they can afford to buy coal. Of course it stands to reason that as long as they have these hydro-electric installations and have those dams there and are generating power, that they already have the investment there, and whatever they can get for it in preference to letting that water go to waste, so to speak, would be just that much gained. Of course when you get back to normal conditions and get greater consumption, and the Aluminum Company, for example, is using all their own power, why that situation would be mitigated to some extent, and they would have to use more coal possibly.

Q. The inevitable result, is it not, of the incorporation of the agency is to eliminate the competition in price between the members of the agency? You have competition from outsiders and you have competition within the agency [fol. 891] as to quality of coal, and that sort of thing. But the inevitable result of the agency is to give to the selling agent rather than to the individual members the right to fix the price at which the coal of the members will be sold? Of course they fix that with relation to the market. But if you make a sale as a sub-agent, selling the coal of your own collieries, must sell it at a price which the agent fixes, and not which the sub-agent fixes?

A. That is true.

Q. Well now, I was wondering this—and I do not know what effect it has on the ultimate question to be decided in the case—if the thought in your mind, and the minds of your associates, was not that the agency, the selling agency would fix prices with relation to conditions in the business rather than with relation to the individual necessities of the individual producers?

A. Couldn't fix them any other way.

(1438) Q. Isn't that really what you are driving at?

A. Certainly. If we undertook to fix them according to the necessities of the coal business it would be just too bad. On the limited production that we are having today. I guess on the operating time that we are having today that the coal industry probably is losing on an average of, I would say, from 35 to 40 cents a ton perhaps for the first six months of this year. And if we undertake to fix them on that basis why we would have to jump prices 50 cents [fol. 892] a ton maybe, to get a little profit.

Q. What I had in mind was this. Under existing conditions if a purchaser of coal sees an opportunity to sell a large order and he has obligations falling due, he may fix his price for the purpose of obtaining that order with relation to his own interests?

A. That is right.

Q. Whereas the selling agent selling for 136 people would fix the price not with relation to the necessities of any particular producer, but with relation to the cost of production and other elements of competition in the general market?

A. Market conditions.

Q. Yes, market conditions. Is that what you had in mind—were you thinking about that—or is that something that I have just imagined?

A. No, that is one of the things that we very definitely had in mind. Anything, your Honor, as I have described, without going into detail, that is cut-throat competition, and the situation that you mentioned there would (1439) probably come under that variety. The exigencies of the situation of some individual operator puts him in the position where he feels like he has just got to go out and dump his coal on the market, hoping perhaps that he will provide a temporary measure of relief so that it will tide him over until conditions get better and he can get it back.

Q. One thing that might cause him to make a different price would be this distress coal that you have been talking about?

A. Yes.

[fol. 893] Q. Another might be his ambition to supercede his rivals in the control of certain fields—something of that sort.

A. Yes. This running time is a matter that has been gone into some. But that I think has been one outstanding matter with the coal industry. The matter of running time is so important.

By Mr. Donovan:

By that I do not mean necessarily continuous running of the mine. But the percentage of running time. For example, if you can run three days a week, you can produce coal for so much less than you can running two days

a week. Two days a week even under existing conditions of course makes a very high cost. Three days a week you substantially reduce your cost because you are dividing your overhead on a much thinner basis. And if you can get up to four days a week why we would feel like (1440) we were almost in heaven again.

By Judge Soper:

Of course we do not know how this organization will affect the running time, but we hope that for the reasons that have been outlined—the more intelligent marketing, and this research work, and advertising, and aggressive and intelligent handling of the coals, that we will be able to increase our running time. (1441) Normally the practice amongst industrial consumers of coal is to contract for the purchase of coal on a yearly basis. Industrial consumers, including railroads, are far and away the largest consumers of coal. Large consumers who are not producers but merely use it for heating purposes, such as large buildings, apartment houses, hotels and things of [fol. 894] that sort, also usually contract on a yearly basis.

A large non-member of this organization, other than the Consolidation Coal Company is the Black Star Coal Company, in the Harlan field. They produce about 2,000,000 tons in a year. (1442) I stated that I would rather compete with the individual mines represented by Mr. Holmes than with Mr. Holmes representing that control. If we multiply that control of Mr. Holmes' so that it grows to be as big as Appalachian Coals, Inc., I have, then, a somewhat more powerful man to deal with.

By Judge Soper:

Q. What I am getting at is this: Take the Black Star Company. Would not the Black Star Company, which does not come in; and does not want to come in, perhaps—maybe you will not let them in in the future, if you get 80 per cent, and you stick to that policy—is not the Black Star Company at much greater disadvantage in marketing its product if it has to compete with not merely agencies of the size of Mr. Holmes', but an agency as big as Appalachian Coal, Inc.?

A. Of course, a company of that size would not be at as much of a disadvantage as a smaller one. But if we can-

not make this thing worth while, to get into it, and give the operators going into it something the other operators have not got, we are not going to get anywhere. If we cannot market this coal so as to make it attractive to the operators who are in here to stay in, naturally they will drop right out, and the thing will fall.

Q. In other words, if you are successful, it is going to be to the interest of all these independent fellows to come in?

A. I do not know about that, your Honor, I appreciate [fol. 895] the fact that it looks like a rather strange situation that we would not want 100 per cent in, but, just as I said in the (1443) beginning, the operation of Appalachian Coals, Inc., is not different, in my opinion, from the operation of the Southern Coal & Coke Company. Frankly, there are certain kinds of operators and certain kinds of prepared coal that perhaps would do Appalachian Coals, Inc., more harm than good by being in it. If this organization functions along the line we expect it to function, we are not anticipating any results from any arbitrary action. If we make this thing a success, we are going to have to get out here and do an intelligent job of marketing, and to do that intelligent job of marketing we have got to restrict, to a certain extent, the operators that come in here, so that we will not have, perhaps, a kind of operator or a kind of coal in here that is going to interfere with what we hope is to be an intelligent marketing program.

By Mr. Donovan:

If I was operating the Black Star, and Appalachian Coals, Inc., fixed a price that was higher than I was willing to take the business, I would slip the price down whatever I thought was necessary to take the business myself. That is what I call "holding the umbrella."

[fol. 896] (1444) If I have any conception of what Appalachian Coals, Inc., means, it would mean, in its ultimate result, that it would be suicide for this organization to attempt to get a price above what the market justified. I have tried to make that clear, how important the matter of running time is, and how important the increase of consumption is. There are so many things in the business that are so much more important than price, and for us to

go out and attempt, with any sort of an arbitrary proposition, to increase the price, would simply kill the goose that we hope is going to lay the golden egg.

It would follow that this organization should be a benefit not only to those who are included in its membership but those who remain out of its membership, if, as Mr. O'Brien suggested, they would be inclined in any way to follow the lead. I do not know whether they would. The coal industry never has done it in the past. We were trying to get a better situation in the coal industry on the part of everybody concerned. If we do not get it we are simply sunk.

By Mr. O'Brian:

Q. What you mean is that if you did advance the price—I am not talking about doing it arbitrarily—but if you did advance the price, then that would help your competitor, because (1445) it would give him a chance to advance his price. That is what you mean, is it not?

A. Well, I don't know that that is exactly a fair way to state it.

Q. I am talking about leadership, now.

A. Certainly we would hope to cause the fellow on the outside, who persists in demoralizing the industry—we [fol. 897] would hope that he would see the light, and come along and play the game.

Q. Come up a little closer?

A. To play the game according to what is considered good business, at least, and not destructive competition. If we can eliminate the destructive competition, we will have done all we expected to do with Appalachian Coals, Inc.

In taking the Black Star Co. as an illustration, and saying that they mine about 2 million tons, I was referring to the group of mines.

(1446) In the Harlan district the largest annual production of non-defendant companies comes from the Black Star Company. The smallest in 1930 was 1,450 tons. I understand that a price is fixed by the selling agency under this plan in the manner I have described. It is true that these operators who are within the agency have very different costs of production so that the same price might mean a small profit to one of them and a large profit to another, according to his (1447) cost of production.

Assuming the same order were given to both parties, one would make more money than the other, but I think the impression that I get from the question is that this sales agency would fix the same price, perhaps, for the whole territory, or for the same grade of coal. My conception of that—I am trying to be absolutely frank about it—I think it is a pretty complicated matter, and pretty difficult to get over, but my conception of the way Appalachian Coals, Inc., will operate, in regard to the price is on just the same basis that the Southern Coal & Coke Company operates in a small way.

They do not make a price on a given day. I think I can illustrate this.

The mines of the Southern Coal & Coke Company are [fol. 898] really controlled by two or three of us, so it is easy to understand how, so far as price control is concerned, we can dominate them. Here is the Southern Coal & Coke Company selling for these operators. We do not any more know, under existing conditions, what price, definitely, we are going to charge all through today or tomorrow, than you do. There will be a variation in there. In other words, we are in a desperate (1448) situation at the present time. All coal companies are.

We have our salesmen out on the road. They report to us, and we give them a price at which they are to sell this coal. They report to us a situation, say, down here in Atlanta or in Detroit. They also have a list of the unbilled coal we have on the tracks. We give them all the information we can with reference to our situation. They will run across a customer in Detroit or Atlanta who will tell the salesman, "If you want to book us up for 50 cars of such-and-such grade of coal at 10 or 15 cents less than the price quoted, we will consider it." The salesman will probably try to get a definite proposition out of him, to see that he will take it at that price, provided he can get the order through. Then the salesman telephones the sales manager in charge of that territory that he can get an order for 50 cars at such-and-such a price, and if he feels that there is any chance the mine can ship that at an even break, he goes ahead and takes it without saying anything about it. If it involves a loss, then he will come in and talk to me about it, and we will decide whether or not, in view of all the circumstances, we are justified in taking that order. That is

the way the price is fixed in the Southern Coal & Coke Company, and we absolutely control the mines. I think that will be the same modus operandi in Appalachian Coals.

Q. (1449) Suppose the order offered Appalachian Coals, [fol. 899] Inc., is a very low order in price.

Appalachian Coals, Inc., tells this sub-agent, "You get $1.50 for this coal today." The sub-agent wires in, or telephones in, "I cannot get that. I have an offer here of $1.00." That $1.00 is below the cost of production for certain mines in Appalachian Coals, Inc. What will they do? Will they turn down that order, or, if they take it, to whom will they assign that order, and who will stand the loss if there is a loss?

A. The individual operator that accepts the order will stand the loss, just exactly the same as in our own case, if we get a proposition on one grade of coal that we cannot ship. Perhaps this other mine, on account of short running time, or something else, will feel that they will take a shot on it. So, we will take it up with them, and say, "Here, we have a chance for a certain order of coal, an order for coal of a certain grade."

Q. One other question. There is to be a quota fixed by the sales agency.

A. I think that is exactly how this price-fixing we have been talking about will be done by Appalachian Coals, Inc. If an order comes in there, they are going to farm it out the best they can.

Appalachian Coals, Inc., hopes to fix a quota for (1450) each order. The contract provides that, as far as practicable. In the event that our company through efficient salesmanship gets more coal orders in the course of a year than its quota, you can not tell what will happen in regard to the pro-rating of those orders. I think so far as the pro-rating of these orders is concerned that is going to be an extremely difficult matter. We cannot do it in our own organization. I do not know what will happen under those circumstances except this, that it does come back to the question that these individual mines are going to insist [fol. 900] upon their percentage of running time, and if one mine goes out and gets orders, they are going to demand of Appalachian Coals, Inc., "You go out and sell enough of my coal to give me substantially the same running time."

Q. The condition of that operator will be about this, will it not? He will be going about his business just as he is now. His agents will be hustling for business, and the orders will be turned in to the selling agency, and assigned by the (1451) selling agency, but the price will be fixed by the selling agency. That is what it comes to, is it not?

A. The price will be fixed along the lines I have just indicated to you. They will work out the thing the best way they can.

Q. How would you pro-rate what is called distress coal? How will the selling agency deal with that? To whom will it assign that?

A. I would assign just as much of it to somebody else as I could.

J. W. DAVIN, another witness called on behalf of the Defendants, being first duly sworn, testified and stated as follows:

(1452) Direct examination.

By Mr. Donovan:

I live in Huntington, West Virginia, and I am (1453) assistant general superintendent of transportation of the Chesapeake and Ohio Railway. My duties bring me in touch with the coal mines on our lines. I have been in touch with the coal mines directly through the car supply situation for the past sixteen years. I have charge of the allocation and distribution of fuel coal to all points on our system, covering 3,115 miles. As I understand the setup of [fol. 901] Appalachian Coals, Inc., they cover all of our high volatile coal fields with the exception of the mines in Ohio. We have 93 active low volatile mines, and 33 inactive on our railroad.

The total production in 1931 of all the mines located on our railroad was 46,628,695 tons. This compares with a tonnage in 1927, the year of the largest production, of 62,156,230 tons of coal. Approximately 80% of our total revenue tonnage is coal. (1454) For the past five years the

approximate average fuel consumption of our railroad has varied from 2½ million tons to 3,120,000 tons annually. Our annual fuel consumption, say during 1931, amounted to approximately 2½ million tons. Our records show 1¼ million tons of our fuel coal originated at defendants' mine. We purchase practically all of our fuel coal.

Our company is operating one mine of its own at the present time and we have two idle. The maximum production is around 1¼ million tons. The name of the mine we are now operating it The Eulass Mine. Its present capacity is 15,000 tons a month. But they have a capacity of practically 750,000 tons annually.

Assuming that Appalachian Coals, Inc., should be organized with a percentage of 73% of the production, and that agency was the exclusive selling agency vested with the power to determine the price (1455), we think we could secure all of our fuel coal necessary to operate the railroad if Appalachian Coals, Incorporated, goes through with their plan.

I prepared that table by taking the tonnage produced by each of the companies shown, dividing it into the number of working days it took to produce that tonnage, and multiplying that by the number of working days in the year. We used as a basis 309 days in this particular comparison because some of the mines worked that length of time. The car ratings are figures from month to month, and on the 8 hour day and for that reason we did not use that.

[fol. 902] Whereupon defendants offered in evidence a statement of the recapitulation of active and inactive mines of both defendant and non-defendant companies on the Chesapeake & Ohio Railway in West Virginia and eastern Kentucky high volatile coal fields. This statement was received in evidence and marked Defendants' Exhibit 38 (1460).

(1546) The totals shown by this recapitulation are:

The total defendant mines active, 65, production in 1931 was 15,554,550 tons, with a capacity of 27,086,243 tons or 43.7 per cent of the total production on the system.

Of the non-defendants, 71 mines, with a production in 1931 of 13,174,500 tons, and with a capacity of 18,872,450 tons, or 30.4 per cent.

Making the total active defendant and non-defendant mines, 136 mines, production of 28,727,050 tons, and with a capacity of 45,958,695 tons, or 74.1 per cent.

The remaining 25.9 per cent is made up of defendant and non-defendant inactive mines.

The total mines of defendant, inactive, 30, with a production in 1931 of 2,240,660 tons, and with a capacity of 8,102,-710 tons, or 13.1 per cent.

Total mines, non-defendant, inactive, 78. Production, 3,097,095 tons, but with a capacity of 7,962,500 tons, or 12.8 per cent.

Making the total defendant and non-defendant inactive mine-, 108, with a production of 5,347,755 tons and with a (1457) capacity of 16,065,210 tons, or 25.9 per cent.

That gives you your full 100 per cent of the operations. [fol. 903] Now, the total defendant mines, active, 65, and the total tonnage for those as stated above, 15,554,550 tons, with a capacity of 27,086,245 tons.

The total defendant mines, inactive, is 30, with a production of 2,240,660 tons, but with a capacity of 8,102,710 tons, gives the total defendant mines, active and inactive, 95, with a production of 17,795,210 tons, and a capacity of 35,188,955 tons, or 56.8 per cent of our total.

The total mines non-defendant, active, 71, with a production of 13,174,500 tons, with a capacity of 18,872,450 tons.

Non-defendant mines, inactive, 78, with a production of 3,097,095 tons, and with a capacity of 7,962,800 tons, making a total of non-defendant active and inactive mines, 149 mines, with a production of 16,271,595 tons, and a capacity of 26,834,950 tons, or 43.2 per cent.

The total mines, defendant and non-defendant, active, 136, production 28,729,050 tons, and a capacity of 45,958,-695 tons, or 74.1 per cent.

(1458) The total mines, defendant and non-defendant inactive, 108 mines, with a production of 5,337,755. Capacity of 16,065,210, or 25.9 per cent.

Giving a grand total of all mines, defendant and non-defendant, 244 mines, production 34,066,805, capacity 62,023,905.

This recapitulation that I have given deals only with the high volatile fields. In our non-defendant mines we have included what we formerly termed "captive mines" but at

the present time the way they are operating we do not count them as such, because each of the mines that were formerly captive are now trying to sell coal on a commercial basis the same as any other mine. That is, our road ships a part of the production of those captive mines for commercial usage. We do not know what that amount is.

[fol. 904] (1459) As I stated, the total production of all the mines located on my railroad in 1931 was 46 million and some odd tons, and the total tonnage I gave on the high volatile recapitulation for non-defendant and defendant mines was something over 28 million tons active. The other 13 million and a quarter tons produced in the low volatile districts and in Ohio during that period make up the difference. In that figure the captive mines were not separated.

Cross-examination.

By Mr. O'Brian:

(1460) I have included these so-called captive mines on the basis of the entire actual shipment, for example for the year 1931. I do not know of my own knowledge that all of that was sold in commercial markets. The reason I state that we have discontinued carrying those mines as captive mines—when they were termed strictly captive mines they were supposed to consume all of the coal mined at that property. And there is not a captive mine on our road today that is not after us constantly to take a part of their tonnage. That is the reason I include them.

(1461) I have no figures as to what part of that tonnage they are consuming and what part they are selling of their own production. They are in about the same fix as the average mine. That is, they cannot work full time and they are only consuming say 40% of their normal production. They would be perfectly willing to sell the other 60% if they could find a market for it.

By Judge Soper:

They are only working on a 40% time now. The captive mines are using part of the coal where it is mined but I do not know what part. The consumer of coal who owns a coal mine does not have his plant right at the mine. It follows that all captive coal (1462) is shipped from the mine, so

that this tabulation includes all captive coal produced and [fol. 905] shipped.

By Mr. O'Brian:

That statement does not purport to show how much of that which was shipped was used by the owner of the captive mine and how much he may have sold in commercial markets. I cannot tell you how much of the production of the captive mines produced on our lines in 1931 was actually sold in commercial markets. The Midvale Colliery Company is not a captive mine. That is a commercial mine. None of those mines that are referred to in the New River high volatile mines district are captive mines. The Monitor Coal and Coke Company in the Logan district is not a captive mine.

(1463) The following companies are captive mines:

Elkhorn Piney Coal Mining Company.
Kingston-Pocahontas Coal Company.
Milburn By-products Coal Company.
American Eagle Colliery Company.
C. & O. Fuel Operations.
Utilities Coal Company.
Youngstown Mines Corporation.

The Utilities 61 and Utilities 62 are not captive mines. They shipped about, I would say, 40% of that tonnage always in the commercial market and have never been termed a captive mine. This one ships all of it. There is another Utilities over here in Kentucky that I think you and I are both referring to. That is a commercial.

(1464) The General Refractories Company at Hitchins is about half and half. They use it when they cannot sell it. There are two of the Utilities Elkhorn Coal Company that use a portion of the tonnage, the Laclede and the other utility of theirs. The other portion is sold on the commercial market and they have never been treated as captive mines. I think that is the mine that Mr. Tate spoke of.

The Inland Steel Company is a captive mine. The King- [fol. 906] ston-Pocahontas Coal Company, Westerly, was formerly a captive mine. The following companies are not captive mines:

Bir-Mar Coal Company at Birch Fork.
C. & O. Fuel Operations at Sarita.

Sharlow By-Products Coal Company.
The King By-Products Coal Company.
The Monitor Coal and Coke Company.
By-Products Coal Company, By-Products.

(1465) The Corrigan-McKinney Steel Company mines formerly were captive.

Referring to my reply as to what these mines were doing now, I do not think that this is a more or less temporary condition beginning subsequent to 1929. We have had it down our way now since 1923. That is, some so-called captive mines have sold coal. Prior to 1923 we were short of transportation, and it was necessary to force the captive mines. Since that time we have been unable to take care of them 100% and the captive mine has gone out of existence.

I do not know what the captive mines are shipping in the commercial markets, but I know this, that they are trying to sell us daily a portion of their tonnage from each of these mines, and not only ourselves, but they are in competition with the other mines in this same territory.

The Chesapeake & Ohio has not sold any of its own captive tonnage; it is not permitted to sell it under its charter (1467).

[fol. 907] Clarence W. Watson was called as a witness on behalf of the Defendants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Donovan:

I live in Fairmont, West Virginia, and am a coal operator. My father opened the first commercial coal mine on the Baltimore & Ohio Railroad in West Virginia in 1852. I was born within an eighth of a mile of this mine, and therefore brought up in the coal region. My first job around a coal mine was in 1875, as car greaser.

I worked continuously around the mines, and I believe filled about every job from car greaser to superintendent of the mine, prior to 1885, when I personally developed the first mine that I had any interest in.

(1468) I became an active executive in a coal mining company about 1894 or 1895 when I had the executive management of four companies having ten mines and about 50% of the production of that district.

Later, between 1900 and 1901, we formed the Fairmont Coal Mining Company, which was strictly a selling company, and sold the output of 43 mines and some 15 or 18 corporations. The so-called Watson Companies had about 50% of the production of that, and we had about 98% of the production of the district. I might say that, in importance, considering the times and the tonnage of the country, I think that was fully equal in importance to this company that was formed with 58 million tons. That is, Appalachian Coals, Inc.

Subsequently, these 43 mines for which I have the selling agency were combined by actual combination and called the [fol. 908] Fairmont Coal Company. I am no longer identified with that company.

At the beginning of the War there were less than 100 mines in the Fairmont region. A year or two after the War (1469) the peak of the number of mines there was 639. At the present time there are less than 100, so that the number is not much different now than it was before the War.

I might say right there that I think our troubles have been pretty thoroughly discussed here, and I do not want to take up too much time, but I think that is a good illustration of our troubles. During the War, of course, it was necessary to have a Fuel Administrator to allocate the coal for the uses of the Government. They appointed a very excellent man, a man of great ability and integrity, but unfortunately he was a college professor. His impracticable ideas—and they are certainly very impracticable—caused this widespread development. I will say he was the cause of these 500 extra mines in that district.

At that time the Baltimore & Ohio Railroad could not serve the region. They were serving it to the extent of about 30 or 40 per cent of the capacity. When you multiply those mines six times, so far as the local region is concerned, you increase the work of the railroads six times. Therefore, when those mines were in existence and operation, the actual output from that district was less than it was when they had 100 mines.

At the present time I am receiver of the Elkhorn Coal Corporation, a West (1470) Virginia coal corporation operating in Eastern Kentucky, and in this Appalachian field. I am also a director in the Kentucky River Coal Company, a land holding company, which leases land, to several of the defendants in this case; also a director in the Beaver Creek Consolidated. That also leases to one or two of these defendants.

[fol. 909] Neither the Kentucky River Coal Company, nor the Beaver Creek Coal Company are defendants here. The Elkhorn Company has joined Appalachian Coals, Incorporated. I am a member of that as receiver of that corporation. I first submitted the contract to the attorneys for the receiver and (1472) then it was submitted to the court and an order of the court was passed as a matter of record, and I am a member of this association by authority of the court.

Last year the production of the Elkhorn Company was about 1,050,000 tons. Its peak production has been about 2,700,000 tons.

The Elkhorn Coal Corporation, exclusive of its 18% interest in the Kentucky River Company and its 28% interest in the Beaver Creek Consolidated Company, has about 200,000 acres of coal land. On its production that is about a billion tons. On its peak production it would take 400 years to exhaust it, and at its present rate of production it would take over 1,000 years.

The Elkhorn Coal Corporation went into receivership on August 1, 1931. I have prepared figures showing the production and realization costs for those five months from August 1 to December 31, 1931 that the company operated in receivership (1473).

This cost includes our mine labor of all kinds, mine supplies, insurance, taxes, workmen's compensation, operating expense—and by operating expense we mean in this statement all salaries of pit bosses, superintendents, clerical work, engineers, chemists, and so on. It does not include selling expense, and depreciation and interest on funded debt.

The tonnage for that five month period was 455,000 tons. The realization was $1.226. The cost was $1.278.

I have also the figures on cost and realization for the six months ending June 30, 1932. The tonnage for the six

months named was 335,000-odd tons. Computing into this the same factors, I will say that during those six months that we had fewer men on salary, (1474) and that we had [fol. 910] more economies in effect than we had in the five months of 1931. The cost for the last six months of 1932 was $1.489 and the realization was $1.079. That is a very good example of the effect of tonnage. Here is a company that has reduced its expenses, but the difference between 90,000 tons a month and 50,000 tons a month, and I have not the figures exactly, but they are approximate, at least, makes a difference in the expense of 25¢ a ton in that cost to us.

The receiver's reports are filed with the court every month. In that report is taken into consideration royalties from oil and gas, royalties from leases and other activities and it does during that eleven month period show a profit but none of that profit has come from the mining of coal.

I attended the Cincinnati meeting. I did not participate in the discussion there; I listened to them. I have no recollection of any discussion by those present (1475) in regard to limiting production in the coal industry. If there was any discussion there of restraining trade I did not hear it. I do not think that fixing the price of coal by Appalachian Coals, Inc. was ever discussed in my presence.

In regard to the effect of the organization of Appalachian Coals, Incorporated, I haven't very much belief on that subject. I have considerable hopes that it will be beneficial to the consumer as well as to the producer. My reasons for that hope are as follows (1476):

I have had considerable experience, probably more experience than any of the other witnesses here, in the matter of selling companies. I was chief executive of the Consolidation Coal Company for over twenty years, and that company in its peak produced itself 14,000,000 tons. There were produced from its properties by lessees over 2,000,000 tons, and one year we sold between 3 and 4 million tons of the Elkhorn Coal Corporation coal and that of other companies.

And I have found that with a large variety of coals that [fol. 911] a large company has, it can better serve customers. It can better allocate their sizes. They can make a distribution better than any single or small company. There are so many of these things that are gone over by

the separate companies that I think there is a very definite opportunity to avoid duplication in the matter of selling expense.

As I have said here, this Elkhorn corporation had a production last year of about one million tons. We send our coal east to Pennsylvania and north of the Ohio River. This is not a large tonnage. This was two per cent of the Appalachian tonnage.

We have offices in Cincinnati, Detroit, Chicago and Minneapolis, for that agency covers a pretty wide territory. We have about fifteen salesmen on the road in automobiles all the time. We have on our books customers—and when I speak of customers I mean those are people who have used our coal. Unfortunately they are not all using it today, but they would use it at a price. They know what our coal is, and they have relationships with us, and if our price is (1477) satisfactory we have an opportunity to sell to them on an even basis.

Now, we have on our books a total number of customers, 1,845, divided as follows: Industries, 296; public utilities, 4; railroads, 3; docks, 4; dealers, 5—well now, I mean by dealers—no, I see I am mistaken about the number of dealers. It should be 1,497. These dealers should be classed as retailers. We aim to visit those customers by some of our men, in automobile or otherwise, in train, at least once a month. Now, if instead of having 2% of this production we had 10%, I believe we could serve our customers better and at about the same expense.

The most of these companies I should say in the Appalachian region, either directly or through selling concerns, cover the same territory that we do. I expect Mr. Holmes' [fol. 912] man was in there this morning, and I expect Mr. Mahan's man was in there this morning, and I expect that Mr. Francis' man was in there this morning. They are all in the same territory, trying to sell the same coal.

I have been familiar with the Cincinnati market for a great many years. (1478) Cincinnati is no different from any other coal market except that it is probably one of the most competitive.

The coals available for that district are low volatile, all the Appalachian coals, some little coal now from the Fairmont region, and I think some coal from Pittsburgh. All the southern coals go in there. When I was with the Con-

solidation Coal Company we sold a large amount of Fairmont coal in Cincinnati from the Pockets.

(1479) I should say that this ran up to about 1916. I do not believe there has been much Fairmont coal gone in there in the last ten years.

The Consolidation Coal Company—I was an officer of that company at that time—had both Fairmont and Elkhorn. Some ten years ago the differential was increased to Fairmont. Prior to that time—if that date is correct—it was the same. That Fairmont rate was raised 10¢. We did not object to that very much because we could get the coal from Elkhorn, and the Consolidation has been putting that Elkhorn since that time into Cincinnati. I think that is a good illustration of how delicate this matter is and how easy it is to shift from one coal field to another dependent upon the freight differential and other conditions. The 10¢ differential was one of the important factors in shifting the business from Fairmont to Appalachian.

Whereupon defendants offered in evidence the statement showing the names and location of some of the industries in Northern Ohio and Southern Michigan that have changed from coal to fuel oil. This statement was re-[fol. 913] ceived in evidence and marked Defendants' Exhibit 39 (1490).

(1480) The information upon which this statement was based was collected and furnished me by the sales department and I believe it to be approximately correct. On that table it is shown that 592,000 tons of coal are displaced annually. This is not made up for any particular territory. I have heard so much discussion about this Michigan peninsula. I wanted some information for my own use and I had our sales people get this up in the last day or two. That is, they reported in from their territory.

I am very well acquainted with the undeveloped coal acreage in and about the Appalachian district and especially in two or three of these districts that have been under discussion. Those districts are Hazard, Elkhorn, Fairmont, part of western Pennsylvania, Maryland and Virginia.

I have gone over those lands many times. I have bought and sold land in all those districts. (1481) In the Hazard

district the Kentucky River has 253,000 acres of thick vein coal. Six feet is regarded as thick vein coal. The peak production from that property was about 6 million tons. Its production now is about 2 million tons. At the present rate of production would be about a thousand years' work there. Adjoining that field the Ford Motor Company has 130,000 acres undeveloped. In addition to that, in another part of the Appalachian field they have 30,000 acres, a part of which is under production. Virginia Coal and Iron has a very large acreage. More than 100,000. Considerably more than that. Maybe 200,000. I stated that the Elkhorn had 200,000. Of the Elkhorn acreage not over probably 12½ per cent of that is under development. Consolidation Coal Company has 130,000 acres. I would say that 25 per cent of theirs probably is under development.

[fol. 914] The Clinchfield Coal Company is not classified in that district. They have a very large acreage, and I have been over that property, but I don't remember the acreage. The Berwind-White of New York has in excess of 100,000 acres on the Forks of the Sandy River, none of which is developed. A year or two ago the Chesapeake & Ohio and the Norfolk and Western both agreed to build into that field. Well, I believe they stopped operations when the depression came along. In that field in particular, in this Appalachian field, of which the Elkhorn (1482) district is a part, there are large acreages still in the hands of the original owners and the farmers. It is not in the hands of any land companies or corporations. I would say within this boundary that the Elkhorn Coal Corporation owns that there is still at least 60,000 acres of coal in their hands.

Going to the Fairmont District there is over a million acres of coal under development and available and undeveloped coal in the Fairmont region. This undeveloped coal acreage is available to the North and South Carolina markets; available for any market. I should say that the present Appalachian Coals are available.

(1483) In the Fairmont field, as I said, there are over one million acres. Of that, the Consolidation Coal Company has over 100,000 acres. The Mellon interests have 160,000-odd acres. The Baltimore & Ohio Railroad, the New York Central, the Pennsylvania, and the Pittsburgh & Lake Erie jointly own over 200,000 acres of coal that

will run about 14,000 tons to the acre. That coal is undeveloped, and I figured the other night that if they wanted to draw their fuel supply from that undeveloped coal for all the division, it might be available for, they would have several hundred years' supply of fuel coal.

I could go along with several of the other fields, and give [fol. 915] you the same descriptions, but that is pretty generally prevalent in all the fields, other than possibly Illinois and Ohio, where they are more closely held by corporations.

I have fairly well covered the undeveloped coal in the Appalachian district. I can go into the other fields in the same way but the result would be about the same.

(1484) In regard to distress coal, there has been a good deal of argument about distress coal. I looked up in the dictionary this morning the meaning of this word "distress", and I find 17 definitions, ranging all the way from shipwreck to stomach-ache.

By Mr. Donovan:

I describe distress coal a little different from most of these operators. I do not agree with some of them. I agree with Ed Mahan, for instance, on everything but that expression "distress coal". I do not believe that shipping coal to tide without having it sold, or shipping it to the Lakes without having it sold, or shipping it to a yard without having it sold, is distress coal. I think that is foolish speculation. I mean that it is foolish speculation on the part of an operator who ships it. Mr. Mahan says he does not do it. We do not do it. When you pin them down you cannot find any of it but there is a lot of it done.

I call distress coal, coal made through force of circumstances—possibly I can illustrate it. The Government had a very intelligent witness here from Kalamazoo, who happened to be burning Elkhorn coal. That coal (1485) is bought for a group of paper mills, just as Mr. Boykin buys for the Carolinas, where one agency buys for a group of these paper mills.

[fol. 916] That is not bought directly by Mr. Hendrick of that company. He buys through an agency that buys for a group of paper mills.

Chase & Woodruff buy for a group of paper mills. They are employed to purchase this coal in bulk. They buy

between 500,000 and 600,000 tons of coal. We get a third of that business. I think the contract calls for 187,000 tons. All of that coal is coal through a 2¾-inch screen. In Eastern Kentucky, we call it modified mine-run. The trade classifies it as nut and slack. In making that coal, that contract, for instance, as an illustration, was made on the first of April. Our sales people could not, at the same time, sell an equal amount of the resultant. Immediately, we had 187,000 tons, or 600 tons a day, of distress coal that we must move in order to comply with that contract.

We could not run over a day or two if we did not move the coal out of our yard. The resultant from that coal is largely domestic. Some of the egg is used for gas purposes, and that w*d* can contract yearly, but the lump is largely domestic coal, and sold to dealers. The dealer trade is largely seasonal. Weather conditions affect that. There is a very active demand in the winter time, or during a cold spell. Unfortunately in these (1486) times, many of the dealers have not the money to put in the usual stocks in the summer for the winter, and they buy it from day to day, and it is very hard for us to move that lump coal to them, unless they can move it out of the yards and get the money for it. That is what I call distress coal. This other stuff that has been discussed here, is simply, to my mind—I may be wrong—speculation. I call that foolish speculation.

Cross-examination.

By Mr. O'Brian:

The selling agency will be subject to the same seasonal [fol. 917] demands. I did not say this distress coal accumulates when there is no seasonal demand for it. I said we could not allow it to accumulate because if we did allow it to accumulate, our works would stop. I say that resultant has to be made when the other coal is made. I did say that the dealer trade is seasonal. I should think that the dealer trade would remain seasonal with the selling agency.

(1487) The selling agency will meet those difficulties. It cannot and will not, in my judgment, get rid of all those difficulties, but it will be in a position to handle them better. For instance, if you today should go to these dealers who

have empty yards—and there are plenty of them who have empty yards today. They are not taking advantage of this market, because they have not the money to pay for it. You could move a lot of that lump coal to them, provided you could give them credit, so that they could carry it into the winter. I do not know very many operators who are giving that credit today.

I think that the selling agency would be in a better position to give that credit. The selling agency should have more capital available for that purpose. If it is going to be successful, it will have to have more than we have.

I call all coal distress coal that is manufactured by necessity. That is, in manufacturing one size we manufacture other sizes.

Q. (1488) Apart from the size for which you have the order, you call the rest of it distress coal, because you say you have to move it in a few days' time. But is not that a normal, regular incident of the production of coal?

A. Well, this selling organization, to my mind, isn't going to be a cure-all. It is only one dose of medicine. But we need several before we will get a cure.

Q. I was merely asking you why you called it distress [fol. 918] coal, if it is the sort of coal you always have to produce as an incident to mining.

A. It always has been produced.

Q. It always has been?

A. And always will be.

Q. Then there is nothing new about that?

A. No. What we are asking is a better way to take care of that distress coal that we have.

I call distress coal all coal that is produced by necessity in filling other orders.

Referring to the selling agency I spoke of, operating in the early part of 1900, which had 43 mines, that selling agency operated less than a year. The same management and same officers put those same properties into an actual property combination, and the same people managed it. I might say in connection with that (1489) selling agency, they had to get operators to join it, through the fear that we would not be able to sell as much coal as they were selling. We finally convinced them that we could sell more than they were selling, and that company actually within

two years increased that tonnage from 4 million tons to 6½ million tons.

The company continued as a selling agency about a year or less and then the properties were consolidated.

In regard to the paper that I presented I have a general knowledge of that situation. I believe that to be approximately correct. I do not know what period of time is covered, how far back these figures go. Some are very recent. I notice one is just now being converted from coal to oil.

For many years all of the oil carried in steamers was carried by coal. Now, nearly all of the coal that is carried, is carried by oil.

[fol. 919] (1490) Re-examination.

By Mr. Donovan:

I have heard the testimony relating to the shipment of Appalachian Coals to the head of the Lakes. So far as I know none of the defendants have docking facilities there for the storage of coal. I was in that dock situation and know considerable about it. During a depression it might be feasible, in the event of the operation of Appalachian Coals, Incorporated, for them to purchase storage facilities there to take care of distress coal, but during good business they could not get very much dock space. The storage capacity of Duluth and Superior docks is in excess of 10 million tons of coal, and I believe the capacity is about 16 million tons. About 10 million tons went up last year, and the docks on Lake Michigan and the docks on the Canadian side of Lake Superior, those docks are nearly all controlled by other than, I mean practically all of them, or I do not believe any of the defendants have (1491) any interest in those docks.

Now, that is a very potential coal market. If this company were producing 58 million tons, it certainly would want extensive docking facilities there. I might say that that is one of the ways to balance the sizes, with lump coal for the farmers in Minnesota, and the Dakotas, hoping to go up in the summer time, and that would be the plan that we would want to ship by, because it would balance our sizes, and it would be what has been expressed here as more or less of a fly-wheel.

As to the coal that is going up there now, if we send it, we are forced to rent dock space, or we are forced to sell it to other coal companies. All those docks up there, I think without any exception, are owned by producing companies. [fol. 920] They are not outsiders. They are not middlemen. They are not dealers. They are all producers of coal; Pittsburgh Coal Company, Consolidation Coal Company, Carnegie Coal Company of Pittsburgh, M. A. Hanna & Company. They are all competitors of Appalachian Coals, Inc., and what we have to do, practically, is to sell to them.

The great evil of the coal industry is due to over-expansion of mines. There are many others but that is the great evil.

By Judge Parker:

Q. Does that result in overproduction, or merely in potential (1492) overproduction? In other words, as I understand your testimony, you state that the thing you complained about particularly was the fact that you had to make sizes of coal that you did not have orders for, in order to get the sizes that you did have orders for. Now, you would not call the producing of coal to fill orders that you actually have orders for, overproduction? You would not call that overproduction for a man to fill orders that he actually had, would you?

A. No.

Q. Now, is there any substantial or real overproduction in the coal business, except in the making of these sizes for which orders have not been received?

A. Yes, I would say that is the only visible overproduction.

Q. Well, now, what I want to get your view about is: How the potential overproduction, overexpansion, affects the market?

A. Well, every coal operator, in order to cut down expense, thinks he has to run six days a week, and if you are going to do it properly, it is almost a necessity to run at least five or six days a week. We are all, therefore, trying [fol. 921] to run and produce coal beyond the demands of the country. And that necessarily makes a real potential overproduction, I should say.

(1493) By Judge Parker:

Q. I think I see that. I want to ask you further this question: How, in your opinion, will the organization of this selling agency relieve or tend to relieve that situation?

A. It will not relieve it. I think Mr. Mahan expressed that very well, and he went into it very thoroughly, and I thoroughly agree with his ideas, that it should be helpful.

Q. Now in what way do you think it is going to be helpful? How is it going to be helpful?

A. I think we will have more intelligent salesmanship. We will have more intelligent operation. We will have a better balancing of sizes. We will have an opportunity to expand our markets. All the electric companies and the oil companies, the power companies, are today pushing their product. They are pushing their product much harder than we are. They have the money to do it, and they are spending enormous sums of money in research work.

I saw a locomotive at Kingston, Ontario, last summer that was being financed by the Kingston Locomotive Works, the Baldwin Locomotive Works, and the General Electric Company, and I believe, the Standard Oil Company. The contract price on it was a million and a quarter dollars. I don't know whether it has been put in operation or not, but the designers claim that that locomotive will burn a combination of electricity, oil and coal. And the designer claims that it will use one pound of fuel—it is the combination of the fuel after it is completed—that it will use one pound of fuel as compared to the present eleven pounds on the Canadian National Railroads.

(1494) Now they are spending this money to push their products. We haven't any to spend in that line.

[fol. 922] How can we do it? Well, there are many ways. If I could illustrate it, if you will give me a moment. I believe the South is going to be a big coal market provided we do not let these power companies and oil companies and electric companies take away from us the fuel that is going to be used in cooling air. Now this is an opinion, and not based on any technical knowledge. I have no technical knowledge. But I believe it would be perfectly feasible to take the furnace in this building and use it to cool the air in this room in the summer time as well as to heat it in

the winter. Now what we want to do is cool that air with coal instead of hydro-electric power. Now when that comes around the South will need more coal to cool itself than it will to heat itself. That is just an illustration of the possibilities. There is a great deal of that that we can do.

Q. Well now, that of course relates to the advertising and the developing of the coal business. In your opinion will this sales agency have any effect in limiting the effect of the over-development, that is, withdraw from competition these vast stores of coal which are available for competition now.

(1495) A. If they should be successful in creating an unreasonable price it would undoubtedly develop more territory.

Q. You have already said that you think part of the distress of the coal industry is due to the availability of these vast stores of coal that have been laid open for use without any real need. Now what I want to know is: Will this selling agency do anything to withdraw those stores of coal from potential competition?

A. I do not see how they can. If their coal is well marketed—and I believe it will be. Take the item of distress coal. They can handle that better. They certainly would stop this bad practice which I call not distress coal, but bad speculation—that certainly as far as these companies are concerned it would stop that. That would not stop all of it, but it would stop a good percentage of it.

By Judge Soper:

For steam purposes coal must be produced more abundantly in the winter time.

(1496) In regard to the other consumers of coal, the [fol. 923] production for public utilities is very uniform throughout. A little more in the winter time than in the summer. But that is the most uniform. Steel companies and manufacturers, it depends upon how their business is running. Of course the householder today hardly ever puts any great quantity of coal in the cellar. He buys from day to day or week to week or month to month. And what I mean by seasonal especially refers to the dealer trade where the householder buys his coal in the season.

By Judge Soper:

Take your Elkhorn mines for instance. Does your business require you to furnish more coal in January, for instance, than it does in July? Have you got any seasons for covering the whole field of consumption?

A. Barring extreme cold weather, when we always get a flurry for coal. We have not had any, unfortunately for us, for a year or two. (1497) That dealer business used to start in July. They began to lay in a stock of coal. Today, you can expect it to start with the fall weather. If it gets cold in October, we will get some business. If it does not get cold until December, we will not get much of that business until December. Outside of those flurries we produce about as much in one month as we do in another.

By Mr. O'Brian:

With regard to Mr. Dewberry's testimony the other day that there were now at billing points or on the track something like 1 million tons of coal for which there was no ultimate billing as yet, a good deal of that does not constitute to my mind overproduction. I would say that the larger portion of that is made through force of necessity. I refer to the speculative coal as coal that is actually loaded [fol. 924] without any orders, nor orders for part of their production. The existence of 1 million tons of coal on the rails undoubtedly tends to knock down the price of coal.

A coal operator who has signed a contract with Appalachian Coals, Inc., takes an order for coal and submits it to the agency. The contract provides that the operator agrees that he will not sell to any one except through the medium of the selling agency. We do not do that today. I think that it is one of the purposes of this to prevent operators from producing coal for which they have no orders. I think you will see it is set forth in this document. We would certainly be very foolish to produce coal that we have no orders for, either when operating under a contract with Appalachian Coals, Inc., or now; but, as a matter of fact, operators do now to some extent produce coal for which they have no immediate orders.

A. Yes.

Referring to this captive tonnage here, I happen to be familiar with one operation. The Inland Steel Company a

couple of years ago leased a large tract of land from the Elkhorn Coal Corporation, on which there was a big mining development. They have since enlarged it. The minimum under their lease in the next few months will be 900,000 tons a year. They have developed that plant. They finished in January or February of this year. I believe it is the most modern plant in this country. Everything is up to date. They are prepared there to make all the sizes of commercial coal. They are using the by-product of the fine coal in their ovens at Chicago. They are selling, or trying to sell—they are not selling that much—50% of that one million tons. That coal is sold through the M. A. Hanna Company at Cleveland. When we made the lease, they negotiated with us to sell that coal, but finally went to Hanna. [fol. 925] Another interesting thing in connection with that lease—at least it was to me rather alarming—is this: We could not get them to agree to pay that minimum for over 7 years. In other words, after 7 years, they have a right to cancel that lease. I asked, "Why do you want that? If you are going to spend $1,000,000 on this property, why [fol. 926] do you want to cancel it after 7 years?" They said they thought there was strong probability that before that 7 years was out, the steel mill would (1501) be smelting all their ores by electricity, and would not need any coal.

This condition that I speak of, of their selling part of it now in the commercial market, is not the result of the existing condition of the industry and their having less demand for it.

This fine coal, especially when they leased that property, was at a less price than the lump and egg. In other words, they would go into the market, and, instead of producing half the coal and using it all, they produced double as much coal as they are going to use in that plant, and sell the coarser grades, because they command a higher price, and therefore reduce the net result in their operations. I might say that, with the exception of the United States Steel Company—and I believe they are preparing to do it—all these captive companies are in the market with their coal.

(1502) CHARLES C. DICKINSON, a witness called on behalf of defendants, being first duly sworn, testified and states as follows:

Direct examination.

By Mr. Greever:

I live in Charleston, West Virginia. I was born there [fol. 927] and have lived there all my life. I have several mines that are members of Appalachian Coals, Incorporated and the Dickinson Fuel Company has qualified as a subagent. I am chairman of the Executive Committee of Appalachian Coals, Incorporated.

I am President of the Dry Branch Coal Company located on Cabin Creek, of the Leevale Collieries, (1503) Incorporated, at Leevale, West Virginia, of the Sudduth Fuel Company at Hutty, Kentucky. The Sudduth Fuel Company is located on the Pond Creek Branch of the Norfolk & Western Railway in what is known as the Williamson field. The other mines are located in the Kanawha field. All these companies are active producing companies at the present time.

I am also President of the Dickinson Fuel Company, which is the sales organization for the three companies that I have just named, and in addition sells the output of four other companies, one the Black Band Consolidated Coal Company located on the C. & O. side of the Kanawha field. Then the Premium Collieries, Incorporated, located on the New York Central Railroad in the Kanawha field. And two in the N. & W. field, the Gray Eagle Coal and Coke Company, and the Winko Block Coal Company.

The Dickinson Fuel Company does not operate any retail yards, but I am the owner of a retail yard at Columbus, Ohio, and another at Chicago. The Chicago yard also has water connection. In addition to my interest in these operating companies (1504) I am interested in some 50,000 acres of coal land in Boone, Kanawha, Raleigh, Nicholas and Logan Counties, West Virginia.

I am a director and member of the Executive Committee of the Kanawha Valley Bank, and director of the Central Trust Company, and have a considerable investment in those two companies. I am also the owner of real estate in Charleston, and that vicinity, all of which is dependent in large measure upon the coal industry, which is the major [fol. 928] industry of that territory.

For some years I have felt it to my best interest to become somewhat active in the movements for the better-

ment of the coal industry, not only on account of the production of coal and the sale of coal, but on account of the investments which I have in coal lands, and in the matter of other investments in that territory. I am Treasurer and a member of the executive committee of the West Virginia Coal Association. I am also a director in the National Coal Association. And of course am a member of the local coal association. I am a member of the Property Owners Committee which has to deal with freight rates and other matters of common interest in this Appalachian field.

The proportion of my time that I devote to strictly coal interests must be somewhere between 50 and 75%. I have to make (1505) a little salt as a side issue.

In regard to the present arrangements which the Dickinson Fuel Company has with the companies for which it sells coal, it has the usual arrangement for the sale of coal, both for the mines in which I am interested as well as what we term outside mines, the four I have just mentioned. That is, that we are to use our best efforts to sell as much or all of the output of those mines and to the best advantage, and we are to return to those mines the actual sales price less 8%. I refer to that particularly because the sales organization, our sales company, must be responsible for the collection of the accounts.

The Dickinson Fuel Company is the exclusive sales agent of those companies. They cannot sell through any others. There are one or two instances of an exception by which one of the N. & W. Companies is allowed to sell a small amount of coal to the N. & W. Railroad. The constract of sale which the Dickinson Fuel Company makes is not subject to the approval of the producing companies unless a sale is what we term a contract and we regard any sale for delivery beyond a period of 60 days as such a contract, in [fol. 929] which event we have the mine company become a party to that contract (1506). That is what we call contract coal.

These arrangements came about in this way. Ever since I have known anything about the coal industry, it has been the policy or the practice of the coal mines to use such sales organization of which the Dickinson Fuel Company is an example. There is nothing whatever new in this arrangement. Dickinson Fuel Company was organized in 1920. My earliest recollection of the coal business in the

Kanawha field was that the Kanawha Fuel Company sold the output of from 70 to 90% of the mines in that territory. In fact the output of some 40 mines. That sales practice was in effect in the early 1900's, 1900 to 1907 or 1908.

The Kanawha Fuel Company not only had agencies in all the cities but had a dock at Milwaukee and attempted to store coal for its mines at that point. I was interested in one of these mines, the Dry Branch Coal Company, which sold its coal through the Kanawha Fuel Company. The Kanawha Fuel Company ceased to do business in about 1907 or 1908.

(1507) We then turned to the C. & O. Coal and Coke Company. That concern sold our output for some five or six years. Or up until about the beginning of the war. During the war we sold it through first one concern and then another, but finally in 1920 we made up our minds that we should organize our own sales company and develop our own markets.

The Kanawha Fuel Company, while it sold coal for our company, acted as exclusive agent for our company. It also acted as exclusive sales agent for other producers. My recollection of the Kanawha Fuel Company was that it was somewhat of a co-operative nature. Practically all of the mines had stock in the Kanawha Fuel Company. Probably a different plan—no doubt a different plan from [fol. 930] that which we are working now, but similar in that the mines had a stock ownership.

I have in my hand a folder published at about that time naming some 40 or 50 of the companies for which the Kanawha Fuel Company sold coal, and I notice offhand the Scranton Splint Coal Company, the Paint Creek Coal Company, the Banner Coal Company, and a great number of others. The reason that it was considered advisable for the producing companies to resort to a selling agency of that sort (1508) was that the producer of coal ordinarily knows very little about the sale. There is just an occasional producer that does know the sales side. Ordinarily they do not have any facilities for selling coal. Though there are some large producing companies that have sales departments. But individual producers as a rule do not have—oftentimes do not have sufficient production to justify salesmen in the various fields. Nor do they

have sufficient production to assemble coal properly at the Lakes. They are unable to avail themselves of the Lake markets except by sales through the transporters, as we term them. And generally they are placed at a distinct disadvantage in so far as the sale of coal is concerned.

In order to properly sell coal we must cover a pretty large market. Our market runs from the Atlantic Seaboard, Virginia and North Carolina, to Minnesota. Covering all the states in between. And even with our normal production of the mines of some 700,000 or 800,000 tons we have to keep six or eight salesmen scattered over those fields, with an office at Chicago.

An individual producer could not do that unless he had a tonnage of that amount. In fact, most sales contracts, as I have said, are made on an eight or ten per cent basis, and with the present low price, sales price of coal, they will lose money if they are not very careful under today's conditions.

In regard to the method by which our sales agency dis- [fol. 931] poses of orders among the producing companies for which we sell, fortunately with us the mines are all in somewhat—or in different seams with one exception, and are all somewhat different grades of coal. Our salesmen in the field are given the prices at which they are to sell this coal. We determine them as the fair market prices, and we place no restrictions on the amount they may sell of one or the other grade of coal. The mines which we are not financially interested in have to rely entirely upon us to be fair with them in the distribution of those orders.

I know of other sales companies selling high volatile bituminous coal as selling agencies such as the Dickinson Fuel Company. Mr. Mahan was on the stand this morning. He said that he sold the output of some sixteen mines. Mr. Holmes sold the output of several. The Smokeless Fuel Company up in my territory sell the output of several of their own mines. And five or six or seven of outside mines. Castner-Curran-Bullit over on the N. & W., where they at one time sold a very large part of the output of Smokeless Coal in that territory. The Old Ben Coal Corporation, an Illinois concern, has now taken on the sale of several mines in our territory. It is the common practice.

I can only tell you by hearsay how long some of these companies have been engaged in that business. I imagine the Castner-Curran-Bullit is as old as I am. About that. The Smokeless Fuel Company has been in business for a number of years.

(1510) By Judge Parker:

The present selling agencies fix the price at which they sell coal. In other words, if we get an order from a manufacturer up in Ohio for 100,000 tons of coal, we can close with him without consulting the mine for whom we sell unless it is a contract.

If it is a contract we either talk to him before the contract is actually closed or before the offer is made or after we have the offer in hand. Because he has to sign that contract before it becomes effective.

[fol. 932] The proportion of the business of our agency that would be contract would be around 30% or 40%, not over that. Possibly not more than 20 or 25%. Our agency does not contract as much coal as a great many others. (1511) Under the present agency agreement the sales corporation is to have the right to sell at prices, but not where the contract is for more than 60 days delivery.

By Mr. Greever:

The contract with the Dickinson Fuel Company is an ordinary contract, so very well understood that for one of those mines we have been selling the output for 11 or 12 years without the scratch of a pen. We have a thorough understanding. There is nothing whatever unusual or novel in that method.

The productive capacity of the mines for which the Dickinson Fuel Company sells coal is about 1¼ million tons. The actual production we sell annually from those mines is ordinarily about 700,000 or 800,000 tons. This year we will do well if we get over 300,000 or 400,000 tons unless there is a heavier demand than we now anticipate (1512).

I have made a particular study of the history and development of the coal industry. As I stated a while ago, my interests in coal and those things relating to it are rather heavy and I have had to give it considerable thought and

study. That study has extended over the past 10 or 15 years particularly. I have, of course, studied the history of the coal industry. I have a knowledge of its production and of the fields of development. My study has led me to divide the history of the development of the coal industry into distinctive periods. In my own mind, I think of it in terms of the period from 1890 to 1900, and from 1900 up to the opening of the War, and then from 1914 to 1918; then the reconstruction period, from 1918 to 1923; and the later period, from 1923 to this date.

The production of coal doubled each ten years, from 1890 [fol. 933] to 1910. In other words, the production during the last named period was twice that of the period from 1890 to 1900, and it has doubled, then, from 1910 to 1920, or during the peak (1513) war period.

The war period, beginning with 1914, was a period in which there was an extreme shortage of car supply. The railroads were only able to furnish us perhaps 33 to 35% of the cars that we needed. We were under the control of the Fuel Administration, and the government was insisting that we produce every pound of coal possible. A number of new mines were opened up, for which there was no necessity whatever.

That was brought about from the fact that coal cars are allotted—were allotted at that time, and are still allotted—on the basis of the productive capacity and the man power of these mines, and if, for example, I had a mine that was capable of producing a thousand tons a day, it was necessary for me to increase that productive capacity and man power to 3,000 tons a day, in order to maintain my normal thousand-ton-per-day output for the month.

Everybody was trying to do the same thing with the result that many new mines were opened up, both by the operators then in business, and by those that were entirely unacquainted with the coal business, but it did not result in the production of any more coal. It was purely a question of car supply. For some reason or other, the Fuel Administration at Washington (1514) did not seem to fully appreciate that situation.

By Judge Soper:

I might state right there that one of the provisions wass —an unfortunate one, too—that a new mine had free car

supply for six months. As a result, a man operating a mine in the hill here would go half a mile off and open up a new mine, and probably pull it out of the same seam, but switch his production of coal over to that new mine, so far as possible, because he got free car supply at that particu-
[fol. 934] lar place.

The coal industry as a whole did not get more cars than they did before (1515).

By Mr. Greever:

Each individual operator, by reason of the method of distribution, tried to increase his capacity, so that he would get more of the cars that already existed. He was trying to get more than his share of cars and his neighbor tried to do the same thing. That resulted in an increase of productive capacity of at least two or three times that necessary in order to produce the required amount of coal. That scramble for cars ended with the War, or very soon thereafter.

The next period down to 1923 was the period of readjustment to normal conditions. During that time, many large consumers of coal put in improved methods for using coal, improved machinery in order to reduce the consumption of coal. The railroads materially reduced their consumption of coal by more efficient methods. The transportation facilities in 1923 were back to normal. They furnished a 100% car supply.

Since that time we have had ample cars at all times. The characteristics of 1923 that distinguished that period from the former (1516) period were that in that period we got the results of those economies that were initiated immediately following the War, and as a result of the high price of coal during the war period. Generally speaking, there has been a steady decline in the production of coal. The exception was the year 1926, the year of the British and anthracite strikes. But it has been a reduction.

There was some improvement in 1929 due to the unprecedented industrial condition and that was reflected in the coal industry. But the general tendency from 1923 down to the present time has been downward. That may be attributed to the more economical use of coal that I have
[fol. 935] just mentioned, and to the other reasons I have just mentioned. But also to a very large increase in the

use of natural gas, oil and waterpower. There have been many developments in the methods of making pipe lines from the oil fields, enabling them to pump natural gas a distance of a thousand miles, for example from the Texas field to Chicago.

There has been a steady tendency downward from 1926 to this date with the exception of 1929. (1517) The Bureau of Mines has recognized that fact and has said, "It is necessary to go beyond the immediate events to understand why the condition of the industry in 1927 and 1928 was not all that might be desired. The depression of those two years has in no small measure been a reflection of certain long time economic forces, the most significant of which is the arrested demand for coal due to fuel economy and the growth of oil, gas and waterpower as a source of energy."

During this period of decline in production there has been a steady decline in price, with the exception of the 1926 period. The competitive situation in the coal markets from 1923 down to the present time has been that marketing conditions have become more competitive as the years have gone by. And we are just now in the fiercest competition which we have experienced within my recollection. In fact, the production for the last six months is the lowest of any of which I have been able to find a record in the Department of Mines for the six months period. They, of course, have records for previous years, but not for the six months period.

There has not been a like decrease in the production of energy during that period, that is, the period from 1923 down to the present time. There has been an increase in the production of (1518) energy during that time, but for the reasons I have just stated, coal has not shared in that increase.

[fol. 936] In regard to the result of this competition on the producers of coal and others connected with the coal industry, I am more familiar with conditions in my own territory. We all know of conditions nationally. For example, in the Little Coal River Valley ten years ago, there were perhaps 40 coal mines. Today, there are only 4. There were about the same number of mines in the Lower Big Coal River Valley, from Whitesville, on down. Today, there are only 4 mines left in that territory. By that I mean operating mines.

Ten years ago, practically every half-mile or mile along those valleys, you would find a coal tipple and a sidetrack. Today, the most of those tipples, even, are gone. None of them is producing coal. A great many mines on the Kanawha River proper have closed down. There is a very marked reduction in the number of mines, the most of them going out through receiverships or bankruptcy, oftentimes properties being sold at a nominal figure, just the scrap value.

The receiverships and bankruptcies of those several mines ought to have had a good effect on those of us that were able to keep our heads above water. But, unfortunately, there has been such a reduction in the consumption of coal that we have all had to restrict production, until now we are only able to operate our mines from one to four or five (1519) days a week.

The mines in the territory I have just mentioned have been closed down permanently. But that is not true generally. For example, I am interested in some coal lands over in Logan County, and I have one mine there the lease of which was surrendered, and it is now being operated on practically a royalty basis, the operator having no investment in the mine, no overhead, and he is a very difficult competitor for the balance of us. That is only an example of that which is happening throughout the entire coal industry.

[fol. 937] In regard to the effect of this condition on the selling policy of operating companies (1520) in this jungle warfare that has been going on in the coal business for some time most of us have had to adopt most any methods that we could in order to keep our cost as low as possible, and in order to keep our losses as low as possible.

Mention has been made earlier in the record of one company that has made some money, but they are so rare that they might be considered as exceptions.

The one thing that has probably depressed the coal industry more than any other thing that I know of is what I might term the stepping down prices as the result of the lower cost which we get out of operating our coal mine five days a week as compared with two days. For example, if the normal price for coal is $1 per ton and we are marketing our output of a certain mine, and only getting a day or two a week at that figure, we may make up our minds that we can make more money by cutting that price from a

dollar a ton run of mine basis to 85¢ per ton. We do that on the theory that by running five days our men can maintain their weekly earnings, but in the end it does not do us much good because our competitor over the hill probably sees that we are running five days a week, and within a few weeks he will put his price down to the same basis as ours, and reduce his wages just as we have reduced ours, and we are both then on the same footing again. And that process of stepping down will go on for probably two or three times in the course of six months.

As I have indicated, the object of this increased (1521) running time and the lower price in order to secure that running time is to give our men the five days per week by which they can earn more weekly than they could at a higher wage working one or two days per week. A man operating a mine in an isolated community is confronted with other problems than just that of trying to make some money out of a coal mine. He has got maybe a hundred men with their [fol. 938] families living in the houses about the mining town. They have no other place to go for work. If that mine is only operating one day, and the day wage is $3, there are only $3 left for a family to live on. So some of the impelling forces of putting out distress coal that we have heard about so much are the result of a labor situation; a feeling on the part of the employer of labor that he must find work for those employees. That they are his responsibility. They have no other place to go unless they are put on Red Cross or relief, and no self respecting operator of a coal mine likes to see that situation at his place.

Take the period during the last two or three or four months. I have said a number of times, and I will say here, that with this very short demand for coal I would be far better off if I would close down those mines completely. But you have got to take into account the human side of it. Are you going to turn these men, women and children out on to the commons to get their living the best way they can, and be public charges, or are you going to accept your responsibility and do the best you can for them?

Whereupon the defendants offered in evidence a report of the U. S. Coal Commission on the effect of irregular operation on the unit cost of production. This report was

received in evidence and marked, Defendants' Exhibit 40 (1522).

This is the report of the United States Coal Commission on the effect of irregular operation on the unit cost of production. It was put out by that Commission which the Government paid $500,000 for, and it ought to be worth something. Incidentally it was headed by John Hays Hammond, one of the outstanding engineers of the country.

You will notice from examination of that report that there is a very marked increase in the cost of production of coal mines with the reduction in running time. For ex- [fol. 939] ample, a mine operating 20 days a month has an increased cost of only 5%. But when he runs ten days a month the increased cost is 30%. And if he is operating only one day a week, or four days a month, the increased cost is 104%.

There is a rather interesting thing shown by the study of this report to which I would like to call the Court's attention. (1523) You will notice at the top of the right hand column they show the days worked as 12 and the increased cost as 21%. If you go further down on the report, they show the days worked as 4, and the increased cost as 104%. If those working days were distributed among two mines and equalized we would have 8 days for each mine, the increased cost of production of which would be 42%. On the other hand, if you add the 21% increase for 12 days to the 104% increase for 4 days, and divide it by two, you have an average increase of 62½%, whereas, as I stated before, if that were divided between 2 mines equally the increased cost would have been only 42%, a saving in cost by equalization of that tonnage of 20% as shown by that report.

That is one of the very things that we have in mind in this Appalachian Coals, Incorporated. It is our thought to divide this tonnage between classes of coal and equalize production as far as we can, and in doing that there is a very material saving according to those figures.

There are two very strong inducements for an operator to run as many days of the month as possible. One is to reduce his cost and the other to give work to his men. Appalachian Coals, Inc., can help in the way I have stated by equalizing the running time between the different mines (1524).

The general effect on the coal producing states, particularly West Virginia, of this situation in the coal industry has been that it has resulted in this stepping down process in which there has been a continual reduction in the wages to labor.

In regard to its effect on the state and county governments, the state of West Virginia normally has within its [fol. 940] boundaries some 150,000 miners. It produces 140 to 150 million tons of coal. Necessarily the state government and the county governments in those coal producing counties, and the municipal governments in the mining towns of 1,000 to 10,000 people situated in those communities, like Logan, West Virginia, or Williamson, West Virginia, or Welch, West Virginia, must rely, in a large measure, upon this coal industry, and thus depend upon it for the support of the state government and its subdivisions. Just now our state is in anything but a comfortable financial situation, for the first time within a good many years.

I attended the meeting held at the instance of Governor Conley to consider that situation. I took part in the discussion. I listened, of course, to Governor Conley's address and after some twenty (1525) operators from over the state had considered the matter for several hours, I offered the resolution that brought about this New York meeting. I did not attend the first New York meeting. I was unable to go on account of severe illness in my family. I did attend the second New York meeting of December 31, 1931.

I think probably something should be said as to the reason for this meeting in Charleston that was called by Governor Conley. At that time the governors of several states, including Pennsylvania, Kentucky, and Ohio, and many of the coal operators in those states, were considerably concerned about the coal industry, and many different plans were being offered to solve its problems. The one receiving the most support was what was known as the Kentucky plan, or Sampson plan, that involved the control of production by executive order of the state.

I imagine they had copied the idea from Oklahoma and Texas. The operators from West Virginia did not favor

that plan when we met. We felt that if such a thing were possible it might do us some temporary good but that it [fol. 941] (1526) would eventually be found illegal and our final fix would be worse than it was at the start.

The Governor of Kentucky, particularly, was insisting that Governor Conley attend the conference at Frankfort. We were afraid that he would attend such a conference and involve the coal industry of West Virginia in that movement, and we decided—or at least I had that thought in offering the resolution—that if we could get this in the hands of the coal industry as a whole, that we would rather risk our chances with these men that were experienced in the coal industry, working out our problem, than to turn it over to the politicians.

As I have stated, the New York meeting resulted from the West Virginia meeting. At the New York meeting of December 3 there were present quite a number of other coal operators or coal men from the Appalachian region (1527). Altogether there must have been 150 operators from over the United States and this Appalachian area was well represented. I do not know just the number, or the exact number.

Following the close of the general meeting that day, we had a meeting of the property owners committee to discuss a freight rate matter that was rather serious at that time. That property owners' committee is made up of the high and low volatile operators in the Southern Appalachian area of Virginia, West Virginia, Eastern Kentucky and Tennessee. At the close of this property owners' committee meeting, a number of high volatile operators present at the meeting, met informally and discussed what they should do in connection with the resolution passed at the general meeting.

The general meeting had recommended this regional or district sales plan, and had named representatives from the several coal producing States over the United States to carry the thought back to the operators in the several [fol. 942] fields, in order that they might consider their recommendations. We there at that time decided that we thought it advisable to call a meeting at some convenient place, Cincinnati being agreed upon, for the consideration of the question whether we should act as districts in this matter or as regionals.

And such a meeting was called at Cincinnati a very (1528) few days thereafter. I attended that meeting. There must have been 150 people at that meeting, coal operators and others interested in the industry. Considerable time was spent in a discussion as to whether or not a district sales agency plan should be adopted and, if so, by what district. It was finally decided we should organize this regional sales organization and it was afterwards called Appalachian Coals, Incorporated. The reason leading to the adoption of the plan to be applied to that region instead of to the local districts was that we thought we ought to have an organization with enough tonnage in it to employ the best talent that we could find, both in matters of sales and sales promotion, and research engineering, inspection, and that no one district with just 10 million or 12 million tons or even 15 million tons of coal, could adequately cover that whole field without an excessive overhead expense.

The considerations leading to the inclusion of this particular territory in order to get that particular tonnage were that this was a meeting of the eight districts from those four states and it was thought, or it was decided, in view of the fact that these high volatile mines were of a similar general character, (1529) by that I mean that the coal is of a similar general character, that for that reason, the best results could be secured by putting them into one organization. In addition, they had been accustomed to working together, as I have said, in freight matters. There was a- acquaintance among them that was helpful in welding such an organization together.

[fol. 943] Volume 8 (1535). CHARLES C. DICKINSON, a witness heretofore called and sworn on behalf of defendants, resumed the stand for further examination as follows:

Direct examination resumed.

I should like to make a correction in the statement I made yesterday. In discussing the report of a coal mine on the effect of irregular operation as to the unit cost of production, I did not use the weighted average, and on that account, reached a false conclusion as to the percentage. I

should like you to take that into account when you are considering my testimony.

By Judge Parker:

The operation of a coal mine for twelve days out of a month of twenty-five days, increases the cost of production 21%; to operate for 4 days a month only, increases the cost of production 104%, to operate it eight days a month increases the cost of production 42% (1536).

Assuming a production during a month of 16,000 (1540) tons at a cost of $1 it appears that one mine producing 16,000 tons in 8 days would have an added cost of 42 cents per ton above the cost per ton of the mine operated 25 days per month or a total added cost of $6,720. Whereas if 16,000 tons are produced by two mines, one producing 12,000 tons on a twelve day operating basis, and the other 4,000 tons on a four day operating basis, the total increased cost is $2,520 for the first mine and $4,160 for the second mine, or a total of $6,680, which would make the increased cost of production of the two mines operating 12 and 4 days respectively, $40 less than the increased cost of production for a mine operating 12 days. I think those figures are ap- [fol. 944] proximately correct if not entirely so.

By Mr. Greever:

But I want to call your attention to the practical side of it. In the actual operation of a coal mine, I am confident that we can produce coal cheaper operating two mines at 8 days per month than we can operating two mines, one at 12 days and one at 4 days. Moreover, there is always involved the question of giving labor something to do. Labor cannot live on 4 days a month. And when we get to that point we have to sacrifice the price of coal, in order to give labor enough to live on.

(1541) I was chairman of the general meeting at Cincinnati and chairman of the sub-committee of that general meeting. The duties of that sub-committee were to go over the plan recommended by the New York meeting and to make such adjustments therein and such changes as would suit the plan to our territory and to the peculiar conditions therein.

We spent an entire day from about 9 o'clock in the morning until about 7 o'clock in the evening, going over that

(1542) plan paragraph by paragraph, and making a change, it seems to me, almost in every paragraph. The committee then recommended at a subsequent meeting that they adopt the plan as changed by this committee. A subsequent meeting was held on December 30th, at Cincinnati.

The meeting was even more largely attended than the previous meeting. It was held on the ground floor of the Sinton Hotel. The doors were open. People were passing in and out. The room was quite crowded with not only coal operators but bankers and people that were interested in the matter generally. The meeting adopted the report of the sub-committee and then adjourned.

[fol. 945] (1543) At that meeting an organization committee was named, to draft the by-laws, to form the corporation, take out the charter for the corporation, to set forth in a clear statement, just what the Appalachian Coals, Inc., intended to do and that is covered by defendants' Exhibit A, filed with the answer.

Another meeting was held at the Sinton Hotel about 30 days later. The operators then present, consisting of those who had expressed a willingness to become stockholders or members in this corporation, approved the by-laws as proposed and the recommendations of this sub-committee. At that meeting Appalachian Coals, Inc., was launched.

There was no agreement at the New York meeting which I attended on December 3, 1931, or at any of the meetings of operators at Cincinnati, or at any of the committee meetings I have mentioned, to limit the production of coal or to restrict its production in any way or to fix prices.

(1545) I did not at any time have any intention of entering into any contract or becoming a party to a contract in any way, for the restriction of the production of coal, or for the fixing of prices. In fact, Appalachian Coals would never have been thought of if we had thought at the outset that production could have been restricted. That was the thing that Governor Sampson of Kentucky was trying to do, and we felt that that would be illegal.

(1546) I, as a coal operator, and through many years of contact with other coal operators, have realized that we could not legally fix prices on coal. Every now and then at Cincinnati and New York some one would ask such a question, but they were always promptly advised that that could not be done.

[fol. 946] You will understand that we spent an entire day on the witness stand, so to speak. I use the term "we". I was chairman of the meeting. Mr. Greever was there, and Mr. Francis. These operators all over this Appalachian territory did not understand the purposes of this meeting. They asked every question that you could think of, and we had to answer those questions as best we could.

Parties asking questions relative to fixing prices and limiting production, were promptly advised that that could not be done, because in our opinion, it would be unlawful.

By Judge Northcott:

There was some reason other than the unlawfulness of such agreements, why we could not fix prices on coal through this organization. While that is true, it is also a fact that coal operators have an anti-trust complex; that they are more fearful of violating some anti-trust law than any other set of men I know of (1548).

Even if it were lawful to fix prices, we could not do it with this kind of an instrumentality. We have, as stated here, within our district, but not selling coal through Appalachian Coals, Inc., some 27 per cent of the production producing coal of similar quantities. We have these captive mines that are now endeavoring to get into this commercial market. We have competition from all these outlying states, such as Ohio, Pennsylvania, Indiana, Illinois and northern West Virginia, western Kentucky, Alabama, competition that would prevent us from (1549) fixing or maintaining prices even if we were so minded.

By Mr. Greever:

It would be impossible for Appalachian Coals, Inc., [fol. 947] through any power of its own to fix prices. Prices are fixed by competition in the markets throughout the entire territory where this coal is sold. We have in all these markets other coals that we must meet. The coal operators of this territory are looking for increased production, and one of the objects of Appalachian Coals, Inc., is to get more production, to be able to get better running time, to expand our field of sales.

There will be competition within Appalachian Coals, Inc., between various classes of coal. Perhaps I can illustrate that: I have in mind a (1550) mine that sells its lump coal ordinarily at $1.50 per ton. There is another mine, that is of a lower grade of coal that sells its production at $1.25 per ton for the large 4 inch lump coal. Now, if the mine selling its coal at $1.50 per ton was not getting its fair share, or if that class of producers were not getting their fair share of the business, they would at once be hammering at the door of Appalachian Coals, Inc., to have their price reduced in order that their classification might sell more coal.

There is a provision in the contract with Appalachian Coals, Inc., that the tonnage as between these classes shall be equalized. But we recognize that it is very difficult, if not impossible, to equalize tonnage between one class and another. There may be an excellent demand for by-product coal. That may be when those mines that are producing domestic coal have little or no demand.

Assuming that organizations similar to Appalachian Coals, Inc., are perfected in other producing districts, the competition thereafter will be certainly as keen and perhaps even more so because we will have as our competitors [fol. 948] those organized districts, with intelligent management, and with their research departments and their sales promotion departments. (1551) We will be fighting an organized regiment, so to speak, instead of being in competition in jungle warfare. In such an event, we would expect such other organizations to perform for their districts the same work of removing handicaps that Appalachian Coals, Inc., proposes to do here.

If these other districts are organized, and, frankly, I would hardly expect many of them to be so organized—we would hope that those districts would get rid of some of the abuses we are trying to get rid of in our territory. And to that extent the general situation ought to be improved. It might result in better realization both for them and for us, by reason of elimination of those abuses. We are expecting to get better profits out of this, or to reduce our losses, is probably a better term, not by reason of any increase in the general price of coal but by reason of savings, by reason of abuses that we will avoid, by reason of elimination as far as we can within our organization, or

complete elimination within our organization and perhaps by setting an example to others, of these no-bills that we have heard a great deal about in this testimony; and a number of other wrongs.

(1552) I have spent a good deal of time in an endeavor to secure better cooperation among the coal producers in southern West Virginia, and to a certain extent in this whole region. We have found it very difficult to get the [fol. 949] operators in this region to put money into some voluntary organization. They have to have something to hang their hat on like Appalachian Coals, Inc., an incorporated company, in which they are stockholders, and of which they feel that they may get some profits, and of which they are a part, in order to stay with an organization that may be designed for the purpose of eliminating all of these abuses.

There is scarcely any meeting of coal operators at which we do not discuss the question of "no bills".

No-bill coal in the strictest sense of the term is coal that is on the tracks at the mine for which we do not have orders. It is the policy of some mines to ship to the scales and to put the billing in the hands of the scales before the arrival of the car. And in the event they do not get that billing there it becomes in a certain sense the no-bills for that particular mine.

But I want to make a clear distinction between what we call no-bills that are on the tracks at the mines and this consigned coal, maybe at the distributing yards or scales, which was shipped down there without an order from the customer, shipped there in the hope that they might get an order before it got there. It comes to the scales. If the instructions to ship it on to the customer are not received by the time the car gets there it is put out on the set-out track. For that there is a charge of $2.30. Then if by the next day it has (1554) not been ordered out there is a $2.00 demurrage charge. And the same is true of the second day. Then if on the third day they do not have an order for it and it is still on the tracks at the scales or division yards it gets on $5 demurrage per day.

The distributing yards of the C. & O. Railway are at Russell. They have miles of tracks there on which they can store an enormous amount of coal and empty cars. [fol. 950] That is approximately an average of 150 miles

from the center of this C. & O. coal field on the one hand. And on the other side Clifton Forge for shipments going east. And in a like manner the N. & W. Railroad has distributing yards and scales at Portsmouth. And at Bluefield on the east. The railroad does not charge for carrying the coal down to these distributing yards. They are carrying it towards the market and that is part of our freight rate to the market.

(1555) Take an example. The mines would in our case ship it to the Dickinson Fuel Company at Russell, and when it arrived there the next morning we would have to have our own billing there, our instructions for shipment to the customer, by either the next morning or the second day, if we wanted to avoid that $2.30 charge. As a matter of practice we do not do that. But that rule was put into effect because some concerns have general offices at Cincinnati, for example, and their mines are 300 miles distant. It grew up in days past when the telephone was not as freely used as it is now. If thereafter we bill the coal to somebody at Richmond, Indiana, for example, it goes ahead at the rate from our mine to Richmond, Indiana.

(1556) We have to take the chance that we will sell the coal in the direction in which the railroad yards to which we ship it are located. As a practical matter we do not do that. We do not think that it is good business, but there are a number of operators that are doing it, and it is the thing that is causing us a lot of difficulty.

(1557) I have never known of any company shipping coal east to the distribution yards and then shipping it back west.

The coal industry is an exception to the general rule. Railroads do not charge demurrage for empty cars placed [fol. 951] on your tracks for loading, nor do they charge demurrage for holding those cars on your tracks for a reasonable length of time. In the salt business, if they give me a box car and I hold it longer than 48 hours, they com- [fol. 952] mence charging me demurrage, and the same way if I would load a car of salt and hold it. They would charge me demurrage at the regular rates. But that is not true of the coal industry.

By Mr. Greever:

Generally speaking, there is no demurrage charged on loaded cars left on the mine tracks.

If we fill up our tracks, we have to shut down our mines. We of course, cannot go ahead mining coal if our tracks are full (1558).

By Judge Northcott:

We do not ship coal without orders. If our tracks are filled with loaded cars, for which we have no orders we shut down the mines. That is possibly the general practice, but there are a large number of operators that do not do that.

I want to make it clear while we are on that, that we make grades of coal and in order to simplify the matter I will take a mine that is producing, or screening 2 inch lump coal and 2 inch nut and slack—just two grades. (1559) Many of us take contracts for nut and slack coal. They are with industries that must have a regular movement of coal. Otherwise, their plants will be shut down, or we will be in violation of our contract. We are running our mine sufficient time in order to fill that contract for nut and slack, but while we are doing it we are accumulating these no-bills of 2 inch lump coal over on the other track. That is when we get in distress. What are we to do? Shall we violate our contract, and tell the regular customer to go off somewhere else and buy his coal? In practice, we have to send out word to our salesmen to use every effort to sell this 2-inch lump coal. We will suggest to them that [fol. 953] if they cannot get the going price of a dollar, to sell it for 95 cents, and as the demand comes upon us stronger by our customer for that slack coal, we press the harder on those salesmen to move that coal, and give them a lower price with which to do it. Under this Appalachian Coals, Inc., plan, it may be true that there is another mine operating just over the hill that has, perhaps, a Lake contract for 2 inch lump coal, and does not have a place to put his nut and slack. He is accumulating no-bills of nut and slack coal on that side of the hill. At the same time, I am accumulating no-bills of 2 inch lump coal on the other side of the hill. If we can use this Appalachian Coals, Inc., as a clearing house, they would say to me, with my no-bills of lump coal, "You ship it to John Smith's customer on the other side of the hill". They would fill that order with it, and they would take his nut and slack coal, perhaps, and help me out with my contract for 2 inch nut and slack.

(1560) By Judge Parker:

The term "no-bill coal" applies to any coal loaded in cars for which we do not have orders and which is not taken from the tracks. It becomes unconsigned coal when it goes out from our track and we do not have an order for it. It becomes unconsigned coal even down on the yards, except in those cases—and they are unusual—where there are general instructions from the mines to ship all coal to the scales, and the scales receive their orders for shipment to the market. I am using the term "no-bill coal" to apply to coal loaded in cars for which we do not have orders and which has really not gotten out of the hands of the mine.

By Mr. Greever:

It is my understanding that Mr. Dewberry included in his enumeration of no bill cars, what I have described as no bill coal and unconsigned coal.

[fol. 954] (1561) With reference to distress coal, there are degrees of distress. If I have a mine that has not operated this week—and my men have not had any work, nothing to get meat and bread with, I will operate that mine, probably, tomorrow, in order to give these men something to do, even though my tracks are full and I do not have orders for the coal that I am about to load, or that which is on the tracks. How do I do that? We will get on the long-distance telephone, and get in touch with the markets, and instruct our salesmen to move that coal that is on our tracks, so that we can run tomorrow. Our tracks are filled up. We cannot get empties to load tomorrow, unless we bill them out this afternoon. That is one degree of distress. You have the distress that I mention a while ago, arising from contracts for coal of one grade, when you do not have orders for the other coal, or cannot move it out on the market.

I agree that there is a difference between distressed companies and distress coal. But when that coal gets in the car, it becomes distress coal, and we have no place to ship that coal. We have orders for the other sizes (1562) and we must move it out in order to comply with our contract. It begins to be distress coal at that point. When one of these companies ships that coal on down to the scales without any orders on their books for it, it gets in a more dis-

tressed condition, because they are then faced with moving it down there promptly or getting on demurrage.

Then, after it gets down to the scales and they do not get the orders, they have to do another thing, move it on to one of these large markets, like Detroit, Cincinnati or [fol. 955] Chicago, with the hope that they can sell it in the two days' time it will take it to get there. When it goes there, it goes on demurrage, just the same way it did at the scales, but there is an added disadvantage.

(1563) These jobbers up in this district keep an accurate run of the number of cars of coal that are on the tracks without consignment, that is, unconsigned cars of coal. They exchange that information among themselves. And they beat down the market in that particular district.

Some mention was made here yesterday, or a day or two ago, that this distress coal at the market went largely to the larger consumers. I do not agree with that view altogether. Oftentimes a man using just one or two cars of coal, nut and slack coal, in a city like Detroit, will keep his contracts with those jobbers, and pick up coal from one and then another at bargain-counter prices, and get it lower than he would on contract, possibly.

Moreover, he doesn't operate so as to give the full benefit of the low price made to the mine. The jobber knows the general market price, and he puts maybe 10 or 25 cents a ton in his pocket. So, neither the consumer of the coal, nor the mine operator, has the profit altogether for that situation.

Coal which has been mined and loaded in cars and which because of the necessities of his business, the producer must sell for the best price obtainable, is a very good definition for (1564) distress coal.

[fol. 956] There is no material difference between the sales agency contract between the Dickinson Fuel Company and the producing companies for which it sells, and the agency contract which the defendant producers have signed with Appalachian Coals, Inc., except as to this sub-agency feature which of course is unnecessary in our present agreements.

I do not have a written contract with any concerns. However, many sales companies do make such written contracts. (1565) But we have dealt on the basis of mutual confidence with our mines, in which we do not have a financial interest,

on the theory that if at any time they do not like our way of selling their coals, they can quit. On the other hand, if we do not like their way of preparing the coal, we can quit.

I meant to say that at present the Dickinson Fuel Company does business in accord with the terms of the contract of Appalachian Coals, Inc., and that is the general way of doing business between the mines and the sales agents.

The proposed sub-agents of Appalachian Coals, Inc., will perform practically the same function as my own sales company does. It is the job of the sub-agent to sell the coal to the consumers and the dealers throughout the country. Appalachian Coals, Inc., has sub-agents because it would have been an impractical thing for Appalachian Coals, Inc., to have attempted to take over the sale of 40 million tons of coal; to have had that quantity of coal dumped on any sales organization at one time would have broken it down, however well perfected it might have been.

[fol. 957] (1566) Moreover, the producers of coal want to keep contacts with their customers throughout the country. They have, perhaps, had those customers for many years, and they wanted their present sales organization to continue to sell to them and to keep their products before them, so far as possible.

I want to make it clear that we do not expect to increase the price of coal through any power within Appalachian Coals, Inc., but we are in hopes that we will get a better price by reason of the more intelligent marketing of that coal, and by reason of the many advantages which I will enumerate later.

There is no doubt in my mind that within Appalachian Coals, Inc. the competition between shippers of certain classes of coal, will not be as keen as it is today. On the other hand, there is going to be competition between shippers of the several classes of coal.

(1567) By Judge Parker:

The life blood of these sub-agencies is the commission which they get. Each one will be out striving to sell all the coal that he can, because commissions are their only source of revenue. Therefore my salesmen will be out fighting for business—the salesmen of Dickinson Fuel Company—getting as much as they can. If they get more than their fair share for our mines, the surplus will be shipped

from other mines, but we, the Dickinson Fuel Company, a sub-agent, will get the commission. So there will be that competition between the sub-agencies.

If the sub-agency sells coal at a cut price, the Appalachian Coals, Inc., can veto that price. I think (1568) you are [fol. 958] correct in stating that within Appalachian Coals, Inc., the competition as to price, between shippers of certain classes of coal will be eliminated, because the price will be fixed by the agency.

By Mr. Greever:

The agency must fix the price to meet the market conditions as they find it from day to day. And in competition with the coals similar in quality in the Appalachian area and throughout these other districts east of the Mississippi River.

In a given territory, such as Michigan, where it appears that 72.5% of its total coal consumption in 1929 came from the Appalachian region, and 27.5% came from other producing districts, that situation indicates the real competitive situation. Moreover, the fact that Appalachian coals have approximated 72% of the consumption of that district, does not indicate that the competition has not been practically as keen as though it only had 50% of that part. This is because there is all the time the suspended sword of Ohio, Pennsylvania, Fairmont, Indiana, Illinois—to a certain extent—hanging over the marketing company that is selling coal in the state of Michigan. Appalachian Coals Inc., has about three-fourths of the business in Michigan now because in years gone by there have been strikes in these other fields. (1569) I am talking about this whole Appalachian producing territory. I do not mean Appalachian Coals, Inc. In years gone by there have been strikes in other fields, sometimes for two months and sometimes for many months. The consumers of coal have found it important to have a reliable source of supply. Moreover, during the War Ohio coals were zoned out of Michigan. During that period we went into Michigan and established our business connections with consumers of coal in that state.

[fol. 959] As Ohio, Fairmont and Pennsylvania shippers now come in and offer in this state coal to our customers—

and they have lower freight rates there—we continuously adjust our prices so as to hold our customers. Moreover, a customer is not going to leave his present (1570) source of supply without giving that source every chance to secure his business. And we are not going to let one of those consumers leave us without making a hard fight for it. The result is that we are holding a good part of that trade in Michigan.

I have tabulated advantages which I conceive will result to the coal producers in the Appalachian region who sell their coal through Appalachian Coals, Inc.

(1571) I have divided these advantages into several different classes, namely, research, savings in the sales costs, removal of unfair trade practices, fuel engineering, sales promotion, credits and collections and advantages to consumer and dealer, and general.

Under the general heading of research I have listed new uses for coal. In order to extend our markets, it is necessary for us to find some way to burn more coal. Some have been mentioned here. (1572) There was an example given by Mr. Eavenson, putting pulverized coal into the homes. Necessarily, we do not know those new uses now, and I cannot mention them, but that is a subject for research.

We do need a lot of information as to the adaptability of certain coals to particular equipment—for example—certain types of stokers, the right kind of coal for certain types of stokers, the right kind of coal for certain pulverized fuel equipment, and the proper coals for gas purposes. If we had all that information in our hands, we [fol. 960] would always be in a position to recommend the very best coal to the prospective buyer or consumer.

Then, one of our serious problems is the finding of a market for off-grades or off-sizes of coal. For example, the smokeless field is today glutted with nut and slack coal. They cannot find a place to put it. We are in somewhat similar shape. But by research we can probably switch some of the buyers, for example, from egg and nut coal, over to nut and slack, by a different sort of equipment in the homes. That is being gradually done. Nut and slack coal has always been a low-priced product. It has been the thing that causes our mines to lose money, and if we could, by some improved method, by research,

find some better way of utilizing that nut and slack coal and increasing the demand for it, our average realization would be improved thereby.

By Judge Parker:

I agree with the testimony of Mr. Holmes as to (1573) the advantages of this organization, but I want to add something to that. He had probably 21 advantages, and I have 48. I may duplicate Mr. Holmes because I do not remember the advantages he named. I do remember that he named some that I had not thought of. I do not claim this to be exhaustive.

1574) Under the heading of Savings in Sales Costs, we have the reduced duplication of sales efforts and salesmen in the consuming districts. We have consolidated advertising. We have reduced cost of overhead, including salaries, rents, and other expenses. I anticipate that there will be a consolidation of these many sub-agencies that we now have here, thereby effecting a further reduction in the general cost of selling.

Under the heading of Unfair Trade Practices, we have the unjust refusals of coal—someone that just refuses coal in order to get a lower price on it, because it is on his market. We have the reduction of the cancellation of coal [fol. 961] orders after they are placed in transit. A number of unscrupulous buyers, or many,—I hope there are not as many as there used to be—will let you get a car of coal in transit, and then cancel the order and demand that you ship it somewhere else, expecting you to make him a lower price. They will give some flimsy excuse as to why they cannot take it.

Prevention of shipment of no-bills, and so forth.

Prevention of unfair deductions by customers. Time and again, our customers say that coal had too much slate in it, or too many small sizes in the lump coal, and any number of excuses, many of which are not fair. We would hope to have an inspector there on the job that would go in there and see (1575) whether his complaint is just. Sometimes it is and sometimes it is not.

That brings me to the subject of Inspection and Grading of Coal. We would expect to inspect this coal as it is being mined, and as it passes over the tipple, to see that as many

impurities as possible are removed in the mine, and again as it passes over the tipple, by the pickers.

Mr. Holmes mentioned yesterday the sampling of the coals at the mines, and at a central laboratory, in order that we may know definitely just what guarantee we can make to our customers, and see that that guarantee is complied with. We would expect to have inspectors out in the field, as I mentioned a while ago, so that if there is any complaint at Detroit, at Chicago or Cincinnati, that inspector would be there, just as they have them in the lumber industry now. That has been their custom for many years. We would hope to reduce the number of standard sizes, and eliminate some of the unnecessary sizes.

The ordinary sizes now used in the coal industry are: 4-inch lump coal, or black coal; 2 x 4 egg coal; 1½ x 2 nut coal and 1½ inch screenings, or slack coal; 6-inch lump [fol. 962] (1576) block coal; 2 x 5 egg coal and 2½ x 5 coal. There are many variations, but I have given you the typical preparation.

Under the general classification of fuel engineering, we would want to have competent combustion engineers who would make steam plant tests. Contracts are often based upon certain results, guarantees of certain results in the plant. Maybe we will take an order for 100 cars of coal, or for 10 cars of coal to be put in on a test run. We want engineers out in the field to do that.

The fuel engineers would have the job of selecting the more suitable coals for particular uses. The more efficient use of coals in steam, metallurgical, and other industrial plants, and for domestic use.

The publication of literature, compilation of literature, showing the advantages of high volatile bituminous coal, as compared with oil, gas, and waterpower, as well as other classifications of coal. There is almost as much rivalry today between high volatile and low volatile producers as there is between coal and oil. We think in different terms.

(1577) A customer to whom we have sold coal will want expert advice of combustion engineers on his problems.

In the matter of sales promotion, we would want a better opportunity to treat on prices where coals differ. To set up sales plans for customers' retail yards.

You understand that we want to extend our markets. If we can go into, say, Greensboro, North Carolina, and by putting on a certain sales plan, a certain sales promotion plan, whereby we may secure more intelligent salesmanship on the part of the domestic dealers there, we have extended the use of our particular coals that much in competition with outside coals.

To set up sales schools for retail yards. We might hold a school in Columbus, Ohio, for all the retail dealers of Appalachian coal in the whole State of Ohio.

[fol. 963] (1578) Retail dealers are careless in their accounting methods. Careless in the matter of their credits. They lose a lot of money on that account, and we people who sell them coal have to stand that loss, as a rule. We would want to try to instruct them along that line.

We would want them to set up service departments, in order to demonstrate the better and more efficient use of bituminous coal, as compared with other coals. That is, to have dealers set up such service departments, and we would want to tell them just where they could get the men to give instruction, and how they can do it.

Now, in the matter of collections and credits: there is a tendency to allow unusual terms, which is a consideration instead of the matter of price. We would like to see that made uniform. Sometimes a producer of coal will offer to ship coal to a man and let him pay for it three months hence.

We need a compilation of consolidated credited information in order to reduce our credit losses.

We would hope, through a common collection agency, probably under the supervision of this organization, to secure cheaper cost of collections, particularly of our bad accounts.

(1579) Now, as to the general advantages, I might state this: The balancing of sizes of coal as produced at the mines. I have referred to that, in giving a typical case, and won't dwell further on it now.

Ability to furnish a regular supply of proper grades of coal to customers. Oftentimes, there is a wash-out on a certain railroad, probably the branch line on which we are located. In that case, the coal would be supplied from another mine of a similar class of coal, possibly.

[fol. 964] Increased opportunity of the sales agent to con-

tract for his coal, thereby reducing sales expense. The sales concern that is to sell spot coal loses money. They only make a profit on that which they sell under contract. We believe that with a large organization like this the buyers of coal would be more willing to contract with us. They would feel better satisfied about contracting with a large organization, than they would, for example, with the Dickinson Fuel Company, because they would have a better guarantee of a regular supply of coal.

Spot coal includes all sales other than term contracts.

We would have more accurate information as to the markets. We would have these branch offices out in the principal distributing centers. As Mr. Francis testified, we would have some of the vice-presidents in charge of the sales of this organization, out in the field all the time, studying the market conditions (1580).

We would want to get the best prices possible. I, no doubt, oftentimes, sell coal at a lower price than is necessary, because I do not have accurate information as to what my competitors are doing there. They would have that information.

(1581) The development of sales during the dull seasons in the bituminous coal business. During this period from April the first to August the first, the mines are always at their wits end to know whether to shut down completely or whether to run on short time, or just what to do. We feel that with Appalachian Coals, Incorporated, that we could probably go to these consumers of coal, and particularly dealers, and arrange with them to store larger quantities of coal during the spring and summer months. That was the [fol. 965] practice for many years, but latterly the price of coal has been going down and the dealer is afraid to put it in. Last year he put in coal in June, and when he got to September he found that the price was lower than it was in June. He lost money on it. There was no advantage there.

Reduced cost of production, I dwelt on, because of more uniform operation.

I think that covers, briefly, some of the advantages of Appalachian Coals, Incorporated, and the advantages which they will have over even a district sales organization.

I think the amount of tonnage handled by the Appalachian Coals, Inc., will enable it to accomplish these changes that could not be accomplished by district organizations.

Cross-examination.

By Mr. O'Brian:

(1582) I cannot show you one of my contracts which I have stated were similar to the contracts entered between the producers and Appalachian Coals, Inc., because my contracts were oral and not written. I have one oral contract that has been running for ten years. The Chesapeake & Ohio Coal Agency, which sold the output of 40 mines some time after 1900, sold for the smokeless producers.

Yesterday, I spoke of a Fuel Company which sold the output of 40 mines some time after 1900. I cannot tell you the difference between the method and organization and sales of that Fuel Company, and the method and sales used by the Chesapeake & Ohio Coal Agency which was declared illegal by the courts.

I do not know the method of organization and sales which was declared illegal by the courts, as that company sold for [fol. 966] the smokeless producers, and I do not know the methods of the smokeless sales organization to which you refer, and I therefore cannot tell you the difference.

When a sub-agent procures for the operator, more business than is allotted to him by the sales agency, Appalachian Coals, Inc., will have that excess amount of coal shipped from another mine, and that sub-agency will get the credit for that sale. But so far as the operator is concerned, the extra business which he would ordinarily get if he were not in the sales agency, will be assigned to one of the other defendants.

(1584) By Judge Soper:

The fourth paragraph of the contracts with Appalachian Coals, Inc., reads in part:

"The participation of the producer in the total sales of the selling agent for the first calendar (1585) month after this contract goes into effect shall be such percentage of the total sales made by the selling agent for that month that the total car allotment of the producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the selling agent for the same period, and therefore the monthly participation of

the producer in the total monthly sales shall be a percentage equal to the percentage of the producer's car allotment for the second preceding month."

By Mr. O'Brian:

That provision regulates the amount of business which the producer can receive through the selling agency. That provision provides that the production shall be averaged as between the classes.

Generally speaking, when the sub-agent, selling for one of the defendants, secures orders in excess of the amount which is to be determined under the formula just read, that [fol. 967] excess is turned over to another defendant by the selling agent. You cannot split a car, however.

(1586) The sub-agent, however, receives his commission on sales made by the sub-agent, no matter who produces the coal. But the defendant whose sub-agent sells the coal loses excess business to one of the other defendants because the selling agent assigns that business to one of the other defendants.

(1587) He also secures the advantages of average running time. That average running time with us is a very important factor, as affecting the costs of operation, and as a coal operator, for the reasons just stated, I would much rather have my production averaged with the consumption of coal, than to have it up and down from month to month.

By Judge Parker:

(1588) We have a very practical proposition here. It is the job of Appalachian Coals, Inc., not only to hold its customers, but to extend them in every way possible. If some particular customer wanted coal from a certain mine, we would do our very best to so adjust the orders at that mine that that particular customer might get that particular coal. Possibly we can do that by switching some other orders from that mine over to another mine, in the case of customers who are not so explicit as to their requirements.

By Mr. Greever:

Orders are pro-rated, and there is not an arbitrary proration made in advance of orders. Orders are taken by these sub-agencies for coal, usually from the mines which

they represent. These orders are turned in to the general agency. The general agency (1589) if it finds the sub-agency is selling too much of a particular coal, will switch the [fol. 968] orders over to another mine of similar quality. By too much, I mean selling more than the fair proportion of the average quality based upon actual sales. It is impossible that on any given day all the mines will be participating in exact accord with their proportion. According to my conception, that has to be averaged over a period of time.

By Judge Soper:

Q. This is true isn't it? Suppose your experts should discover that your coal had a particular use which the other coals did not enjoy—a certain group of mines. There might grow up an immediate demand for that coal on the part of the public far in excess of the present demand for it. It could not be filled, under this agreement, if I understand you, because you could only sell in any month the same proportion of the total sales that were sold and delivered in the second preceding month.

A. My situation is probably typical. (1509) I have a mine in the Dorothy seam. There are ten other mines in that same seam, producing almost an identical quality of coal. Probably the Dorothy mines would be a class, and if necessary, to supply orders, those mines would run 5 or 6 days a week, whereas another mine that I have over on the Norfolk & Western, producing by-product coal, would be running only 1 or 2 days a week.

By Mr. Greever:

In other words this pro-rating of orders is made on the basis of classes of coal, so that I think the situation suggested by Judge Soper could never come about.

(1592) The sub-agent is the sub-agent of the general selling agency and that a general agency is his principal, and not the producer of the coal. He is however selling the coal of a particular operator. The contract provides that this agency is to divide the tonnage in so far as it may be done, between the mines producing the same class of coal. [fol. 969] When I use the words "the operators fair share of the business" I meant the share that he would obtain un-

der this contract. It is the intention of this contract to divide this fairly as between the operators, insofar as they can, consistent with supplying the coal the customer requires.

[fol. 970] Appalachian Coals, Inc. is formed to extend our business and not to restrict it. And we realize that we must (1593) either give the customer what he wants in the way of coal or he will go to one of the outside buyers and get it, or go to another district. In Michigan we have a certain degree of advantage, because we have been long established.

Q. And that is always true, isn't it, where a particular kind of coal, sold under a particular name, like Appalachian Coals, is established for any length of time in a market? There is a certain advantage in being therein, in being settled in the market, isn't there?

A. Yes; of having contacts with your customers.

Those customers sometimes get accustomed to their special grade of coal, from a particular mine, for example. That is common with the larger users of coal. But I can hardly think of an exception in which the customer cannot get the same grade of coal from another mine either within or without the agency. Large purchasers of coal very frequently specify coal from a particular mine when they order.

(1594) They change very quickly from one coal to another in the territory or in the vein, or in the entire district, if there is any advantage in price. Price is the important factor with the buyer. I don't think customers change for one cent, but a nickel is as big as a cartwheel these days. In the majority of cases if there is a difference of five cents a ton, we will lose the business. It is true now that we oftentimes in submitting our bids put odd cents rather than even a nickel. We will put coal at 69c, say.

There are certain customers, or certain classes of customers who would rather pay the excess between his old price and five cents less a ton and keep the same coal. (1595) I would not say that that is typical of the large users of coal who have been ordering from a particular [fol. 971] mine. For example, I produce Pond Creek coal. There are a half dozen other mines producing from the same seam, some of whom are members and some of them are not.

[fol. 972] (1596) My impression is that the percentage of shipments from the Appalachian territory into Michigan for 1929 is probably representative for some years prior to 1929. There was a period earlier than that in which our percentage was considerably larger. That was during the time when they had strikes in the Ohio fields. The consumers up there began to look for a reliable source of supply. Now they are steadily making inroads on our business, taking our customers away from us. We trace our initial strength in Michigan to the War when Ohio coal was zoned out. That gave us our foothold. Since then they have had these interruptions, these strikes. (1597) They were an unreliable source of supply to the consumers up there and the consumers came to us to get coal. They could get coal whenever they wanted it.

I previously described what I meant by distress coal, saying that there were various degrees of distress connected with that coal once it was put out into cars on our mine tracks. This process that I described of putting this coal out into cars on our mine tracks because we had at that moment as yet no orders for it did not exist during the war and the period of heavy demand thereafter. During the War we often had coal sold for 30 days ahead. All the coal that we had. In abnormally good times when there is a high demand for coal, such as the war period, this coal was not distress coal (1598) because we had plenty of orders ahead for it.

Q. My question was directed to coal that you had mined and put out there and had no order for. Now that sort of coal is—what I am trying to get at is this: That is the normal way coal is produced, isn't it? This coal that is loaded into the cars on the mine tracks is coal that is the result of mining other grades of coal for which you have orders?

[fol. 973] A. That is correct.

Q. Well, that has always been the case in the history of the coal industry has it not?

A. Except during the periods described.

(1598) During periods of abnormal times we have orders for all kinds of coal before it gets out on the tracks. During the latter part of the War all coal sold for prices that were entirely too high. And that is one of the things we hope

Appalachian Coals, Inc., will prevent, these run-away markets that cause the substitution of oil and gas and other fuels and the introduction of economies that are putting us in the plight we are now in. Strikes in other fields would also affect our ability to dispose of coal quickly. (1599) In fact, anything that affected the production of coal in other fields, or the supply of coal available for immediate demand. If the coal which I generically call distress coal actually sold on the market for a fair price, it would not be distress coal after it was sold.

[fol. 974] If all the districts were organized, it would be an advantage to the Appalachian sales only so far as it would correct some of the abuses which we hope to remedy in Appalachian Coals, Inc. The competition would be keener than it is now, if anything, but it would be intelligent competition. We would be using fair weapons. (1600) It would be better for Appalachian Coals, Inc., to have other districts organized in a similar agency, in so far as abuses are concerned, (1601) but I would rather whip an enemy, regiment by regiment, than I would a whole army, and that would be our situation here.

We are now fighting these various districts. They are made up of individuals. Their competition is not as difficult, while they are in a disorganized state, as it is going to be later. But as I said before if they are organized—and I do not expect them all to be—we would use fair weapons.

We think it is a great advantage to organize Appalachian Coals, Inc., as one selling agency, rather than to organize eight separate selling agencies as originally contemplated in New York for the reasons stated. Any one district would not have sufficient tonnage with which to employ the trained experts that I have referred to, and to remedy the conditions I have mentioned.

The first 5 lines of the seventeenth paragraph of the contract with Appalachian Coals, Inc. reads:

(1602) "It is the intent of this agreement to provide for an orderly and businesslike method of selling the coal of the producer by the selling agent hereinbefore appointed the producer's exclusive selling agent, and it is therefore agreed that the producer shall not dispose of, sell, or ship

any coal except upon the order and at the direction of the selling agent, as provided in paragraph Second hereof."

[fol. 975] Yes, that agreement is necessary because if there were no such agreement, it would be impossible for the selling agent to fix the price, or to determine the price of the coal of the 137 defendants. The selling agent determines the price in the competitive market. It is naturally provided here that the producer shall sell all his coal through the selling agent, just as the mines which my company represent must sell all of their coal through my company.

The provision that the 137 producers shall agree not to sell or dispose of coal except through the selling agent, was not put in the contract in order that they might fix the (1603) price, but naturally we would not attempt to sell part of the coal of a producer, and not sell the other part. Assuming that the producer only sold half of his coal through the selling agent, the matter of price would not be different.

I cannot see the difference between the competition of half of the coal of a particular mine and the same coal in another seam next door, except some insignificant competition, where some man might pay 2 or 3 or 4¢, or 5¢, or 10¢, in order to get a particular brand of coal.

Q. If this covenant on the part of the producer were not in this contract, and the selling agent would fix a price for the particular grade of coal of all the 137 defendants at $1.50, and one of the defendants on that same day should offer a part of his coal at $1.30, do you mean to say that would have no effect on the selling price fixed by the selling agent?

A. Yes. As I said a while ago, it would do it in just the same manner as though an outside mine offered the same coal at $1.30.

Q. Is it not perfectly plain that it would be impossible for the selling agent to make a price on this coal in the method prescribed by the contract, and under the condi-
[fol. 976] tions prescribed by the contract, unless the defendants agreed not to offer their coal in competition with that coal? Do you understand my question?

A. I think I can answer you in this way, and it will be perfectly clear. If a price of $1.50 were established for

the coal of a particular mine, and this mine, or its sales agent, went to the particular customer that had been offered that coal at $1.50, and offered it at $1.40, of course the customer would buy from the mine.

By Judge Soper:

Q. Referring to the probable revenues, the gross revenues of Appalachian Coals, Inc., according to Government Exhibit 2, Table 1, Sheet 8, the amount of tonnage shipped by all the defendants in 1929, was 58,000,000 tons, approximately. Would it be fair to assume that in 1929 that coal sold at the mine at about $1.50 a ton?

A. That is about right. In so far as this Appalachian area is concerned, it is always below the general field.

Q. Let us say $1.50 for purposes of illustration. I do not mean to tie you down to that precise figure. That would mean, then, that that coal brought, f. o. b. the mines, about $87,000,000. The contract provides that the selling agent shall get 10% of the gross selling price, f. o. b. the mine, so that the revenues of Appalachian Coals in such a year would be $8,700,000. What I wanted to ask particularly, bearing in mind these figures, is this: Have you, or have your associates, to your knowledge, made any estimate of what these various activities which you propose to install would cost? In other words, have you figured out how much it would cost for you to run a laboratory, advertising, and expert advice, and that sort of thing? Or is that still up in the air?

A. That is not fully determined. That is not yet determined. We have not gotten down to the figures with [fol. 977] regard to that.

Q. You have made no estimate on that?

A. I might state right there that an almost unlimited amount of money can be spent in promotional advertising and probably good returns secured from it. For example, the gas people have an appropriation of several millions of dollars to be expended over the next few years for that.

Q. Have you determined, for instance, that of the 10% which you would get in the way of gross revenues, that you would spend, let us say, 8% or four-fifths of that amount in sales expense, in the sale of the coal?

A. You understand that of the 10% that we get, 8% goes to the sub-agent.

Q. I do.

A. That only leaves 2%, or $1,740,000.

Q. That is the reason why I picked the 8%. Do you then figure that you would have about 2% of your gross sales available for this other purpose?

A. That is correct.

By Judge Northcott:

(1608) As I interpret the contract, if there were a direct demand for the coal from a particular mine in excess of the allotment under the contract, the consumer would get [fol. 978] the coal nevertheless. The consumer, if he demanded it, could get all the coal from one particular mine. The consumer would still get the coal, if it would result in the mine running above its allotment. We are in the business of expanding the use of this coal. It is inconceivable to me, and I do not understand that the contract prevents us from supplying the customer the kind of coal that he wants. Otherwise we would lose that business and none of our members would get it, or might not get it. It would go to some outside producer.

(1613) By Judge Northcott:

If a man orders coal, specifying that he get the product of a certain mine, and the effect of the order would allow the mine to run beyond its proportion allotted under the contract, the consumer will not be prevented from getting the coal from that mine because of that fact.

(1614) That question was raised time and again. The answer was always that we must find some way of giving that man the coal that he wants. We cannot afford to lose a customer and let him go out somewhere else and get his coal. That is my understanding. This contract may or may not be that flexible. But that is my understanding of the way I would interpret it if I were sitting on the board of directors.

By Mr. Greever:

I spent from nine o'clock in the morning until seven o'clock at night working on the contract. It was my understanding of the intention of the contract that the consumer must have the coal that he wants and that we

must find some way of supplying him with that coal. If it is not within the strict interpretation, then we must make it flexible enough to that.

(1615) The sub-agent designated by one producer may sell coal from another company. On the other hand, the particular mine may have several sub-agencies selling for it.

[fols. 979 & 979½] By Judge Parker:

My company represents Appalachian Coals, Inc., as a sub-agent. We will sell coal for other mines than the Dickinson mines. We expect to have in our hands the prices of all these other mines. And if we have some particular customer who wants coal from some other mine, we will sell him that coal and get our 8%. The primary object of our sub-agency will be to sell as much of our own coal as we can.

(1616) It is my understanding that we could sell other than coals from our own mines, without the consent of the sales agent. We would always have in hand the prices on these various grades of coal.

OFFERS IN EVIDENCE

Counsel for the United States offered in evidence a stipulation with reference to percentage of coal sold in certain states by the defendants. It was received in evidence, as Government Exhibit 21.

Thereupon the following contracts referred to by the witness, Francis, were offered and received in evidence:

Copy of contract between Landstreet-Downey Coal Company and General Coal Company was received in evidence and marked Defendants' Exhibit 41.

Copy of sales agency agreement between Landstreet-Downey Coal Company and the North American Coal Corporation dated January 2, 1930, was received in evidence and marked Defendants' Exhibit 42.

Counsel for the United States offered in evidence a stipulation between the parties with reference to the per-

centage of defendants' production in the Appalachian region on various bases and with reference to the scope and effect of defendants' Exhibits 2 and 3. This was received in evidence as Government Exhibit 22. (1626)

[fol. 980] GOVERNMENT'S EXHIBIT No. 1

IN UNITED STATES DISTRICT COURT

[Title omitted]

Stipulation No. 1

It is hereby stipulated by and between the petitioner and the defendants in the above entitled cause, as follows:

1. That if H. R. Hawthorne, Secretary and General Counsel of Pocahontas Fuel Company, Inc., #1 Broadway, New York, New York, is called to testify, he will testify substantially as follows:

The committee representing operators in the Smokeless Field of West Virginia (known as the Pocahontas, Tug River, New River and Winding Gulf districts) procured a charter for a selling agency under the name of Smokeless Coal Corporation. At a meeting attended by producers of by far the larger part of the coal produced in that region, the plan was recommended for adoption and the proposed forms of contract were considered in detail. The committee printed and distributed a pamphlet, a true copy of which is annexed hereto and marked Rider A and which will be identified and offered in evidence by this witness, containing the charter of Smokeless Coal Corporation, its [fol. 981] by-laws, forms of a contract between it and producers, of a contract between it and subagents, and of a stock subscription agreement. Early in February, 1932, the committee advised operators that no further action would be taken until the legality of said plan had been determined by the courts, but that it appeared than an organization could be perfected with sufficient tonnage to make it a complete success. A true copy of the notice dated February 10, 1932 to smokeless coal operators of Southern West Virginia is annexed hereto and marked Rider B and will be identified and offered in evidence by this witness.

2. C. F. Taplin of Taplin and Fillius, Union Trust Building, Cleveland, Ohio, if called to testify will testify as follows:

The committee representing operators in the State of Ohio procured a charter for a selling agency under the name of Northern Coals, Inc., and obtained a license for it to do business in the State of Ohio. The committee printed and distributed a pamphlet, a true copy of which is annexed hereto and marked Rider C and which will be identified and offered in evidence by this witness, containing the charter of this corporation, its by-laws, forms of a contract between it and producers, of a contract between it and subagents, and of a stock subscription agreement. The pamphlet stated that it was hoped that all producers having mines in Ohio and in the West Virginia Panhandle would be brought into the agency. The plan was last considered at a meeting of operators early in March 1932.

[fol. 982] 3. C. F. Richardson, President, West Kentucky Coal Company, Sturgis, Kentucky, if called to testify will testify substantially as follows:

At a meeting of a majority of the producers in western Kentucky in January, 1932, the common selling agency plan was approved in principle by all except one of the producers present. The meeting considered forms of a contract between producers and the proposed selling agent and of a contract between it and subagents, true copies of which are annexed hereto marked Rider D and which will be identified and offered in evidence by this witness, which the committee had prepared, and certain changes were suggested. At a further meeting of producers early in February, 1932, the committee was instructed to prepare by-laws for the selling agency and a plan of organization.

4. Hal E. Booth, Vice President, Pittsburgh Coal Company, Pittsburgh, Pennsylvania, if called to testify will testify substantially as follows:

The committee representing operators in Western Pennsylvania appointed a subcommittee, which devoted a large amount of time to working out a common selling agency plan and sent a questionnaire to about 75 producers in that district.

5. Horace Hammond of the Alabama By-Products Corporation, Birmingham, Alabama, if called to testify will testify substantially as follows:

A group of operators in Alabama conferred concerning the organization of a common selling agency for producers in that State and designated counsel to prepare an outline along the lines of the plan of organization of Appalachian Coals, Inc.

[fol. 983] 6. R. M. Hite of Fairmont, West Virginia, if called to testify will testify substantially as follows:

A general meeting attended by producers representing a majority of the tonnage in northern West Virginia was held in January, 1932. The meeting approved in principle the common selling agency plan and appointed a committee to draw up a definite plan of organization for the northern West Virginia district. The committee prepared (1) a general statement regarding the plan, (2) form of charter of selling agent, (3) form of by-laws, (4) form of stock subscription agreement, (5) form of contract between producers and selling agent, (6) form of contract between selling agent and subagents and (7) form of suggested minutes authorizing execution by producers of contract with selling agent and of subscription to its stock. A true copy of galley-proof of a proposed pamphlet to be entitled "Plan of Organization of Fairmont Coal Sales, Inc." and containing the seven items named above is annexed hereto and marked Rider E and will be identified and offered in evidence by this witness. This pamphlet was never prepared in completed form or sent out.

That nothing herein contained shall constitute, or be construed as constituting, an admission by the defendants that any facts, documents or papers herein stipulated to be true are relevant or material to a decision of the issues in this cause; and the defendants hereby reserve the right to object to their admissibility upon the ground of relevancy and materiality.

John Lord O'Brian, The Assistant to the Attorney General, Attorney for Petitioner. E. L. Greever, Attorney for Defendants.